

San Francisco Law Library

No. _____

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, BOSTON & MAINE RAILROAD, a corporation, CENTRAL NEW ENGLAND RAILWAY COMPANY, a corporation, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation, THE MICHIGAN CENTRAL RAILROAD COMPANY, a corporation, ERIE RAILROAD COMPANY, a corporation, CHICAGO & ERIE RAILROAD COMPANY, a corporation, THE CANADIAN PACIFIC RAILWAY COMPANY, a corporation, THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a corporation, SPOKANE INTERNATIONAL RAILWAY COMPANY, a corporation, CHICAGO & NORTH-WESTERN RAILWAY COMPANY, a corporation, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a corporation, and J. M. DICKINSON, as Receiver thereof, BOSTON & ALBANY RAILROAD COMPANY, a corporation, UNION PACIFIC RAILROAD COMPANY, a corporation, OREGON SHORT LINE RAILROAD COMPANY, a corporation, OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,

Defendant in Error

TRANSCRIPT OF RECORD

Filed

AUG 30 1916

On Writ of Error to the District Court of the United States for the District of Oregon.

F. D. Monckton
Clerk

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, BOSTON & MAINE RAILROAD, a corporation, CENTRAL NEW ENGLAND RAILWAY COMPANY, a corporation, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation, THE MICHIGAN CENTRAL RAILROAD COMPANY, a corporation, ERIE RAILROAD COMPANY, a corporation, CHICAGO & ERIE RAILROAD COMPANY, a corporation, THE CANADIAN PACIFIC RAILWAY COMPANY, a corporation, THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a corporation, SPOKANE INTERNATIONAL RAILWAY COMPANY, a corporation, CHICAGO & NORTHWESTERN RAILWAY COMPANY, a corporation, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a corporation, and J. M. DICKINSON, as Receiver thereof, BOSTON & ALBANY RAILROAD COMPANY, a corporation, UNION PACIFIC RAILROAD COMPANY, a corporation, OREGON SHORT LINE RAILROAD COMPANY, a corporation, OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,

Defendant in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United States for the District of Oregon.

INDEX

	Page
Amendment to Answer	70
Answer	49
Answer of New York, New Haven & Hartford Railroad Company	66
Answer, Amendment to	70
Answer, Demurrer to	72
Answer, Order on Demurrer to	74
Answer, Order to Amend	69
Appearance of New York, New Haven & Hart- ford Railroad Company	66
Assignment of Errors	193
Bill of Exceptions	102
BILL OF EXCEPTIONS:	
Testimony of W. J. Finke, for Respondents..	103
Stipulation as to Pleadings.....	110
Exceptions to Findings of Fact.....	114
Exceptions to Conclusions of Law.....	129
Exceptions to Refusal to Make Findings Re- quested	132
Exceptions to Refusal to Adopt Conclusions of Law Requested	137
Exhibit, Transcript of Record of Proceedings Before Interstate Commerce Commission.	141
Respondent's Exhibit 1. (Testimony taken before Interstate Commerce Commission).	161
Bond on Writ of Error.....	211
Citation	2
Clerk's Certificate to Transcript.....	218
Complaint	5

	Page
Conclusions of Law	92
Conclusions of Law Requested and Refused.....	101
Demurrer to Answer	72
Demurrer to Answer, Order on.....	74
Exhibits ¹ (see Bill of Exceptions)—	
Findings of Fact	80
Findings of Fact, Requested and Refused.....	97
Judgment	94
Jury, Stipulation, Waiving	67
Order Allowing Writ of Error.....	209
Order to Amend Petition.....	68-69
Order to Amend Answer.....	69
Order on Demurrer to Answer.....	74
Petition	5
Petition, Order to Amend.....	68-69
Petition for Writ of Error.....	190
Praecipe for Transcript	215
Reply	75
Stipulation Waiving Jury	67
Stipulation as to Pleadings (see Bill of Exceptions)	
Stipulation as to Printing Record.....	217
Testimony ¹ (see Bill of Exceptions)	
Testimony Before Interstate Commerce Commis- sion ¹ (see Bill of Exceptions)	
Writ of Error	3
Writ of Error, Petition for.....	190

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY, a corporation, et al,
Plaintiffs in Error

—VS.—

BALLOU & WRIGHT, a corporation,
Defendant in Error

Names and Addresses of the Attorneys of Record.

MR. H. A. SCANDRET, MR. W. W. COTTON and MR.
CHARLES E. COCHRAN, Wells-Fargo Building, Portland,
Oregon, for the Plaintiffs in Error

MR. WILL H. BARD, Pittock Building, Portland, Oregon, and
MR. JAMES E. FENTON, Call Building, San Francisco, Cal-
ifornia, for the Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,
District of Oregon—ss.

TO BALLOU & WRIGHT, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein New York, New Haven & Hartford Railroad Company, et al., are plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 5th day of May, in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN, *Judge.*

Due and legal service of within Citation on Writ of Error by a certified copy thereof, prepared and certified to be such by C. E. Cochran, one of the attorneys for plaintiffs in error, is hereby admitted at Portland, Oregon, this 5th day of May, 1916.

WILL H. BARD,

Of Attorneys for Defendant in Error.

Filed May 5, 1916. G. H. MARSH, Clerk.

*In the United States Circuit Court of Appeals
for the Ninth Circuit.*

THE NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY, a corporation, et al.,
vs *Plaintiffs in Error,*
BALLOU & WRIGHT, a corporation,
Defendant in Error.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America.

To the Judge of the District Court of the United States
for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Ballou & Wright, a corporation, Plaintiff and Defendant in Error, and The New York, New Haven & Hartford Railroad Company, a corporation, Boston & Maine Railroad, a corporation, Central New England Railway Company, a corporation, The New York Central & Hudson River Railroad Company, a corporation, The Michigan Central Railroad Company, a corporation, Erie Railroad Company, a corporation, Chicago & Erie Railroad Company, a corporation, the Canadian Pacific Railway Company, a corporation, The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, Spokane International Railway Company, a corporation, Chicago & Northwestern Railway Company, a corporation, The Chicago, Rock Island & Pacific Railway Company, a corporation, and J. M. Dickinson, as Receiver thereof, Boston & Albany

Railroad Company, a corporation, Union Pacific Railroad Company, a corporation, Oregon Short Line Railroad Company, a corporation, Oregon-Washington Railroad & Navigation Company, a corporation, Defendants and Plaintiffs in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE,
Chief Justice of the Supreme Court of the
United States this 5th day of May, 1916.
(Seal of the U. S. District Court)

G. H. MARSH,
Clerk of the District Court of the United States for
the District of Oregon.

By F. L. BUCK, Deputy.
Allowed by R. S. BEAN, Judge.

Service of the above Writ of Error made this 5th day of May, 1916, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court, a duly certified copy of said Writ of Error.

G. H. MARSH,

Clerk of the District Court of the United States
for the District of Oregon.

By F. L. BUCK, Deputy.

Filed May 5, 1916.

G. H. MARSH, Clerk,

United States District Court, District of Oregon.

By F. L. BUCK, Deputy Clerk.

*In the District Court of the United States
for the District of Oregon.*

March Term, 1915.

BE IT REMEMBERED, That on the 3rd day of June, 1915, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit:

COMPLAINT.

Ballou & Wright, a corporation,

Petitioner,

vs.

The New York, New Haven & Hartford Railroad Company, a corporation,

Boston & Maine Railroad, a corporation,

Central New England Railway Company, a corporation,

The New York Central & Hudson River Railroad Company, a corporation,

The Michigan Central Railroad Company, a corporation,

Erie Railroad Company, a corporation,

Chicago & Erie Railroad Company, a corporation,

The Canadian Pacific Railway Company, a corporation,

The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation,

Spokane International Railway Company, a corporation,

Chicago & North Western Railway Company, a corporation, and J. M. Dickinson as Receiver thereof,

The Chicago, Rock Island & Pacific Railway Company, a corporation,

Boston & Albany Railroad Company, a corporation,

Union Pacific Railroad Company, a corporation,

Oregon Short Line Railroad Company, a corporation,

Oregon-Washington Railroad & Navigation Company, a corporation,

Respondents.

Comes now petitioner, Ballou & Wright, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at the City of Portland, in Multnomah County, and State of Oregon, and a citizen of, and domiciled in, the said State of Oregon, and for its cause of action against said respondents, The New York, New Haven & Hartford Railroad Company, a corporation, Boston & Albany Railroad Company, a cor-

poration, The New York Central & Hudson River Railroad Company, a corporation, The Michigan Central Railroad Company, a corporation, Chicago & North Western Railway Company, a corporation, Union Pacific Railroad Company, a corporation, Oregon Short Line Railroad Company, a corporation, Oregon-Washington Railroad & Navigation Company, a corporation, alleges:

I.

That the said Ballou & Wright, is now, and was at all of the times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at the City of Portland, in Multnomah County, State of Oregon, and as such corporation, is now, and was at all of the times herein mentioned, a citizen of, and domiciled in, the said State of Oregon.

II.

That the respondent, Union Pacific Railroad Company, is now, and was at all of the times herein mentioned, a corporation, duly organized and existing under and by virtue of the laws of the State of Utah, with its principal office and place of business at Salt Lake in the said State of Utah, and as such corporation, it is now, and was at all of the times herein mentioned, a citizen of, and domiciled in, the said State of Utah.

III.

That the said respondent, Oregon Short Line Railroad Company is now, and was at all of the times herein mentioned, a corporation, duly organized and existing

under and by virtue of the laws of the State of Utah with its principal office and place of business at Salt Lake, in the said State of Utah, and as such corporation, it is now, and was at all of the times herein mentioned, a citizen of, and domiciled in, the said State of Utah.

IV.

That the said respondent, Oregon-Washington Railroad & Navigation Company, is now, and was at all of the times herein mentioned, a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office, and place of business, and with its principal operating office at Portland, Multnomah County, State of Oregon, and as such corporation is now, and was at all of the times herein mentioned, a citizen of, and domiciled in, the said State of Oregon.

V.

That the said respondent, Oregon-Washington Railroad & Navigation Company, was at all of the times herein stated, the terminal company which in conjunction with the said other respondents, moved the shipments hereinafter mentioned.

VI.

That each of the other respondents above named is now, and was at all of the times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of one of the States of the United States, with its principal office and place of business therein, but the petitioner does not know and is unable to state the particular State of the United States wherein

either of said other corporations was organized, or wherein it was at any time, or is now existing, or the particular State of which either of the said other respondents was at any time, or is now a citizen, or in which it was at any time or is now domiciled, but petitioner alleges: That each of the said other corporations at all of the times herein stated did business, as a corporation, and in its corporate name, with the said petitioner, and each of the said other respondents should and of right ought to be required either to set out fully and particularly in its answer to this petition, the particular State wherein it was incorporated and organized and wherein it is now existing, and the place of its principal office and business and its citizenship and domicile, or each of the said other respondents should and of right ought to be estopped from denying its corporate existence, or from requiring petitioner to allege either the place where either of said other corporations was incorporated, or was at any of the times herein stated, or is now existing or the place of its principal office or business or its domicile or citizenship; or in lieu thereof, the said petitioner should be permitted upon leave of the Court, first obtained, when all of the said facts are discovered to make all necessary allegations touching said matters. That J. M. Dickinson is now and was at all the times herein stated the duly qualified and acting receiver of the said Chicago, Rock Island and Pacific Railway Company.

VII.

That said petitioner is now, and was at all of the times herein stated, as such corporation, engaged in the business of a wholesale and retail dealer in, and in the

sale of, motorcycles and other vehicles and merchandise, with its principal office and place of business at the City of Portland, Multnomah County, State of Oregon; and at all of the times herein stated it had a large and extensive trade in said business in the State of Oregon, and in other States on the Pacific coast.

VIII.

That each of the respondents above named was at all of the times herein stated, and it is now a common carrier, engaged in interstate commerce, by railroad and in the transportation of passengers and property by railroad for hire over its lines of railways, and between Armory, and other points in the state of Massachusetts, and the City of Portland, in Multnomah County, and other points in the State of Oregon, and other states and territories of the United States, and in the Dominion of Canada; and as such common carrier, each of the said respondents was at all of the times herein stated and it is now, subject to the provisions of the Act of Congress of the United States, entitled An Act to regulate commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

IX.

That the said petitioner on the several dates hereinafter shown and set forth, caused to be delivered to the said respondent, The New York, New Haven & Hartford Railroad Company, at Armory, Massachusetts, and the said respondent on the said several dates received, the certain carload shipments of motorcycles as hereinafter shown, for transportation and delivery to

the said petitioner at Portland, Oregon; and thereafter the said respondent operating with said other respondents, caused each of the said shipments to be delivered to the said complainant and petitioner at Portland, Oregon, between April 1, 1911, and January 24, 1913.

X.

That at the time of the shipments hereinafter shown and set forth, dated respectively March 25, 1911, and March 9, 1912, Trans-Continental Freight Bureau Westbound Tariff 4-I, I. C. C. 942, issued by R. H. Countiss, was in effect, and carried a first class rate of \$3.00 per 100 pounds, and the said first class rate from Armory, Massachusetts, to Portland, Oregon, then established and in force and effect was \$3.00 per 100 pounds; and at the time of the shipments hereinafter shown and set forth dated respectively July 3, 1912, August 22, 1912, and January 3, 1913, The Trans-Continental Freight Bureau Westbound Tariff 4-I, I. C. C. 942 issued by R. H. Countiss, was in effect and carried a first class rate of \$3.70 per 100 pounds, and the first class rate from Armory, Massachusetts, to Portland, Oregon, then established and in force and effect was \$3.70 per 100 pounds.

That at the time of the said shipments the said first class rates as shown by said tariff were and are just and reasonable and should have been applied to motorcycles in carloads.

XI.

That the said respondents charged and collected, and the said petitioner paid to said respondents, under protest, on each of the said shipments hereinafter shown, a

commodity carload rate of four dollars per one hundred pounds, which said charge was and is excessive, unjust and unreasonable, and in violation of said Act to regulate commerce and Acts Amendatory thereof, and supplementary thereto and particularly Section one thereof.

XII.

That the following is a detailed statement, as to each shipment upon which reparation herein is claimed by the said petitioner against said respondents, showing:

1. Point of origin of shipment and date thereof.
2. Waybill number and date thereof.
3. Car number and initial.
4. Carriers interested, and route and point of destination.
5. The weight and commodity rate charged and collected.
6. The weight and first class rate in effect and applicable to motorcycles in carloads, at the time of each of said shipments, and the amount which should have been charged and collected.
7. The amount of reparation due, based upon the first class rate in effect at the time of each shipment.
8. Amount of overcharge.

FROM	WAYBILL	CAR	
Armory, Mass. 8/22/12	Springfield CH-3212-8/23/12	M&O-18688	New York, New Haven & Hartford Railroad Company (Springfield), Bos- ton & Albany Railroad Company (Al- bany), New York Central & Hudson River Railroad Company (Buffalo), Michigan Central Railroad Company (Chicago), Chicago & North Western Railway Company (Omaha), Union Pa- cific Railroad Company (Granger), Ore- gon Short Line Railroad Company (Huntington), Oregon - Washington Railroad & Navigation Company (Port- land).
Armory, Mass. 7/3/12	Springfield CH-397-7/4/12	LS&MS-59489	"
Armory, Mass. 3/9/12	Springfield CH-675-3/10/12	St. P. 75858	"
Armory, Mass. 1/3/13	Springfield CH-671-1/4/13	C.-62384	"
Armory, Mass. 3/25/11	Springfield CH-5730-3/26/11	MYBH-71635	"

14 *New York, New Haven & Hartford R. R. Co.*

Weight and Commodity Rate Charged and Collected.

WEIGHT	RATE CHARGED	AMOUNT COLLECTED
15,000 lbs.	\$4.00 per 100 lbs.	\$600.00
15,000 lbs.	4.00 per 100 lbs.	600.00
15,000 lbs.	4.00 per 100 lbs.	600.00
16,700 lbs.	4.00 per 100 lbs.	668.00
17,300 lbs.	4.00 per 100 lbs.	692.00

79,000 lbs.

Total amount charged and collected \$3160.00

*Weight and First Class Rate in Effect, and
Applicable to Motorcycles in Carloads, at
the Time of Each of Said Shipments, and
the Amount Which Should Have Been
Charged and Collected:*

WEIGHT	RATE WHICH SHOULD HAVE BEEN CHARGED	AMOUNT WHICH SHOULD HAVE BEEN COLLECTED
15,000 lbs.	\$3.70 per 100 lbs.	\$555.00
15,000 lbs.	3.70 per 100 lbs.	555.00
15,000 lbs.	3.00 per 100 lbs.	450.00
16,700 lbs.	3.70 per 100 lbs.	617.90
17,300 lbs.	3.00 per 100 lbs.	519.00

79,000 lbs.

Total amount which should have been charged
and collected \$2696.90

Total amount of overcharge \$ 463.10

XIII.

That the foregoing shipments consisted of five carloads of motorcycles which were moved over the lines of

the said respondents as hereinbefore shown and mentioned. That the aggregate weight of the said shipments was 79,000 pounds; and the said respondents charged and collected, and the said petitioner paid, as freight for said service a commodity rate of \$4.00 per 100 pounds, or the total sum of \$3160.00. That said petitioner paid to said respondents under protest, all of the said excessive, unjust and unreasonable freight charges for said service at the city of Portland, Multnomah county, Oregon, between April 4, 1911, and February 1, 1913. That the aggregate weight of the shipments made on March 25, 1911, and March 9, 1912, respectively, was 32,300 pounds, and when these shipments were made, the first class rate which should have been applied to motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon, was \$3.00 per one hundred pounds, which would amount to the total sum of \$969.00.

That the aggregate weight of the shipments made July 3, 1912, August 22, 1912, and January 3, 1913, respectively, was 46,700 pounds and when these last named shipments were made the first class rate which should have been applied to motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon, was \$3.70 per one hundred pounds, which would amount to the total sum of \$1727.90.

That based upon the first class rate which should have been applied to motorcycles in carloads at the time of these several shipments the amount which petitioner should have paid on all of the said shipments was the total sum of \$2696.90 and no more.

That the said rate charged and collected by the said respondents from the petitioner was excessive, unjust and unreasonable to the extent that it exceeded the said first class rate which should have been applied to motorcycles in carloads and in effect at the time the said shipments were made. That the difference between the amount so unjustly and unreasonably charged and collected by the said respondents and the amount the said petitioner would have paid at the said first class rate which should have been applied to motorcycles in carloads, and then in effect was, and is the sum of \$463.10.

XIV.

That by reason of the said excessive, unjust and unreasonable charges made and collected by said respondents for the said service the said petitioner was been damaged in the sum of \$463.10, being the difference between the amount actually charged and collected by the said respondents and paid by the said petitioner, and the reasonable amount which the said petitioner would have paid based upon the said first class rate at the time of said shipments which should have been applied to motorcycles in carloads.

XV.

That on the 10th day of March, 1913, the said petitioner filed its petition with the Interstate Commerce Commission of the United States, against the said respondents and the other respondents mentioned in the title of this cause, which said petition is number 5616 in the files of said Commission, and is in writing in words and figures as follows, to-wit:

Our No. 378.

Before the Interstate Commerce Commission

Ballou & Wright,

vs.

The New York, New Haven & Hartford Railroad Company,

Boston & Albany Railroad Company,

Boston & Maine Railroad,

New York Central & Hudson River Railroad Company,

Michigan Central Railroad Company,

Central New England Railway Company,

Erie Railroad Company,

Chicago & Erie Railroad Company,

Canadian Pacific Railway Company,

Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Chicago & North Western Railway Company,

The Chicago, Rock Island & Pacific Railway Company,

Union Pacific Railroad Company,

Oregon Short Line Railroad Company,

Spokane International Railway Company,

Oregon-Washington Railroad & Navigation Company.

The petition of the above named complainant respectfully shows:

1. That complainant is a corporation, wholesale dealer in motorcycles, and is located in the city of Portland, State of Oregon.

2. That the defendants above named are common carriers engaged in the transportation of passengers and property by railroad between points in the State of Massachusetts and points in the State of Oregon,

and as such common carriers are subject to the provisions of the Act to Regulate Commerce, approved February 4th, 1887, and Acts Amendatory thereof and supplementary thereto.

3. That this complainant on the several dates hereinafter shown caused to be delivered to the New York, New Haven & Hartford Railroad Company at Armory, Massachusetts, certain carload shipments of motorcycles as hereinafter shown for transportation to this complainant at Portland, Oregon.

4. That on said shipments said defendants assessed and this complainant paid charges based on rate of \$4.00 per One Hundred pounds with a minimum carload weight of 15,000 pounds, this complainant having suffered thereby in the sum of \$1732.54 representing the difference between charges assessed and what would have resulted from application of rate of \$2.50 per 100 pounds with minimum carload weight of 15,000 pounds contrary to and in violation of said Act.

5. That Trans-Continental Freight Bureau West-bound Tariff 4-I, I. C. C. 942, issued by R. H. Countiss, carries a less carload rate of \$4.50 per 100 pounds and a carload rate of \$4.00 per 100 pounds with a 15,000 pound carload weight on motorcycles.

6. That said Schedule I. C. C. 942 also carries less carload rate of \$4.50 per 100 pounds on bicycles crated and carload rate of \$2.50 per 100 pounds with a 10,000 pound carload minimum.

7. That the difference between carload rate of \$4.00 and less carload rate of \$4.50 on motorcycles results in an unnatural spread and is unduly discriminatory as

between carload and less carload freight, and as such is contrary to and in violation of said Act especially Section 3 thereof.

8. That the rate assessed on the shipments subject of this complaint is in itself and generally in consideration of the services performed and especially with reference to carload rate of \$2.50 per 100 pounds on bicycles, unjust and unreasonable and as such contrary to and in violation of said Act, especially Section 1 thereof, and

9. That a just and reasonable rate applicable to said shipments would be not to exceed \$2.50 per 100 pounds with a 10,000 carload minimum.

10. That here follows a detailed statement of the shipment subject to this complaint, showing:

1. Point of shipment.
2. Waybill number and date.
3. Car number and initial.
4. Carriers at interest.
5. Weight and charges assessed.
6. Claimed reparation.

FROM	WAYBILL	CAR	VIA
Armory, Mass. 8/22/12	Springfield CH-3212-8/23/12	M&O-18688	New York, New Haven & Hartford Railroad Company (Springfield), Bos- ton & Albany Railroad Company (Al- bany), New York Central & Hudson River Railroad Company (Buffalo), Michigan Central Railroad Company (Chicago), Chicago & North Western Railway Company (Omaha), Union Pa- cific Railroad Company (Granger), Ore- gon Short Line Railroad Company (Huntington), Oregon - Washington Railroad & Navigation Company (Port- land).
Armory, Mass. 7/3/12	Springfield CH-397-7/4/12	LS&MS-59489	"
Armory, Mass. 3/9/12	Springfield CH-675-3/10/12	St.P.-75858	"
Armory, Mass. 1/3/13	Springfield CH-671-1/4/13	C-62384	"
Armory, Mass. 3/25/11	Springfield CH-5730-3/26/11	NYNH-71635	"

FROM	WAYBILL	CAR	VIA	
Armory, Mass. 4/19/12	F-203-4/19/12	NH-85911	New York, New Haven & Hartford Railroad Company (Fitchburg), Boston & Maine Railroad (Newport), Canadian Pacific Railway Company (Sault Ste. Marie), Minneapolis, St. Paul & Sault Ste. Marie Railway Company (Portal), Canadian Pacific Railway Company (Kingsgate), Spokane International Railway Company (Spokane), Oregon- Washington Railroad & Navigation Company (Portland).	
WEIGHT	CHARGES	OVERCHARGE		
15,888 lbs.	635.52			
Should be 15,888 lbs.	2.50			
				236.32
				<hr/>
				Total overcharge \$1732.54

11. WHEREFORE, complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violation of said Act to Regulate Commerce, and establish and put in force and apply as maximum in future to the transportation of motorcycles in carloads between Armory, Massachusetts, and Portland, Oregon, in lieu of rate of \$4.00 per 100 pounds charges, rate of \$2.50 per 100 pounds carload minimum or such other rate as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore described, the sum of \$1732.54 or such other sum as, in view of the evidence to be adduced herein, the Commission may consider the complainant entitled to, and that such other and further order or orders be made, the Commission may consider proper in the premises and complainant's cause may appear to require.

BALLOU & WRIGHT,

By.....

Portland, Oregon.

Dated at San Francisco, February 26, 1913.

J. O. BRACKEN,

Attorney for Complainant,

656 Pacific Building, San Francisco, Cal.

XVa.

That the said cause being at issue upon the said complaint of the said petitioner and the answers of the respondents on file with said Commission, the said cause

coming on regularly for trial on the 6th day of September, 1913, and the said petitioner having produced its evidence in support of its said petition, and the said respondents having offered and submitted evidence against the said petition and in support of their said answers, the said cause was submitted to the said Commission for its decision on October 15, 1913;

That thereafter such proceedings were had and taken by the said Interstate Commerce Commission upon the said petition and answers and upon the evidence adduced thereon, that on the 3d day of February, 1914, the said Interstate Commerce Commission made its report in writing in respect thereto in words and figures as follows- to-wit:

Unreported Opinion No. A-494.

Interstate Commerce Commission

No. 5616

BALLOU & WRIGHT

vs.

New York, New Haven & Hartford Railroad
Company, et al.

Submitted October 15, 1913 Decided February 3, 1914.

Rate charged for transportation of motorcycles, in carloads, from Armory, Mass., to Portland, Ore., found to have been unreasonable to the extent that it exceeded the first class rate contemporaneously in effect. Reparation awarded.

J. O. BRACKEN for complainant.

GEORGE D. SQUIRES for Oregon-Washington Railroad & Navigation Company.

REPORT OF THE COMMISSION.

By the Commission:

Complainant is a corporation engaged in the sale of motorcycles at Portland, Ore. By complaint filed March 10, 1913, it alleges that it was charged an unreasonable rate for the transportation of motorcycles in carloads from Armory, Massachusetts, to Portland, Ore. The establishment of a reasonable rate for the future and reparation are asked.

The shipments described in the petition were made between March 25, 1911 and January 1, 1913, consisted of seven carloads of motorcycles, and moved over the lines of the defendants. The aggregate weight of the shipments was 115,503 pounds, and freight charged were collected in the sum of \$4,620.12, based upon a commodity rate of \$4.00 per 100 pounds. The commodity rate contemporaneously in effect on bicycles in carloads, boxed or crated, from and to the above points, was \$2.50 per 100 pounds. Complainant alleges that the rate charged was unreasonable to the extent that it exceeded \$2.50.

At the time of the shipments in question the first class rate from Armory to Portland was \$3.00 per 100 pounds. The first class rate in effect at the present time is \$3.70, and this rate is applicable to motorcycles in carloads.

In *Motorcycle Mfgs. Asso. v. B. & O. R. R. Co.*, 26 I. C. C. 127, we said:

In *Merchants Traffic Asso. v. A. T. & S. F. Ry. Co.*, 13 I. C. C. 283, the Commission established a rate of first class on motorcycles in carloads from St. Louis,

Mo., to Denver, Colo. In *Rose v. B. & A. R. R. Co.*, 18 I. C. C. 427, a rate of one-and-one-half times first class l. c. l. on motorcycles from eastern and central freight association points to Pacific Coast destinations was found reasonable. In unreported opinoins Nos. 435 and 436 reparation was awarded upon shipments of motorcycles from Chicago, St. Louis and Milwaukee to Denver, Colorado, upon the basis of one and one-half first class in less than carloads, and first class in carloads.

The opinion of the Commission as gathered from the above decisions has been that motorcycles should be given the first class rate in carloads. We are satisfied upon further consideration of this question, that motorcycles, as now manufactured and offered for shipment, may properly be classified as first class c. l., with a minimum of 12,000 pounds for a standard car, 36 feet in length, and the present official classification will not therefore be disturbed.

In western classification, motorcycles and bicycles are now rated first class in carloads and one and one-half times first class in less than carloads.

* Complainant contends that the rate on motorcycles should be no higher than the rate contemporaneously in effect on bicycles. A similar contention was made in *Rose v. B. & A. R. R. Co.*, 18 I. C. C. 427, in which we said.

It is not necessary here to determine that there should be an unvarying relation between the rates on motorcycles and bicycles where they are packed and shipped in the same manner.

We found in that case that one and one-half times the first class rate was reasonable for the transportation of less than carload quantities of motorcycles.

For the reasons given in cases referred to herein, and on this record, we are of opinion and find that the rate charged complainant on the shipments made by it was unreasonable to the extent it exceeded the first class rate in effect at the time the shipments were made. We further find that complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first class rate contemporaneously in effect; and that it is, therefore, entitled to an award of reparation. On this record, however, the amount of reparation cannot be determined.

Complainant will be expected to prepare a statement showing, as to each shipment upon which reparation is claimed, the date of movement, point of origin, point of destination, route, weight, car number and initial, rate applied, charges collected, and the amount of reparation due based upon the first class rate contemporaneously in effect. This statement, with the freight bills covering the shipments, should be submitted to the defendants for verification by them. Upon receipt of such statement so prepared by complainant and verified by the defendants, the Commission will take up the matter with a view to the issuance of an order for reparation.

Inasmuch as motorcycles are now rated first class in the western classification, no order for the future is deemed necessary.

By the Commission:

(SEAL)

GEORGE B. MCGINTY,

Secretary.

XVI.

That thereafter such proceedings were had and taken by the said Interstate Commerce Commission in said cause that on the 14th day of August, 1914, the said Commission made and entered its decision and order of reparation in writing in words and figures as follows, to-wit:

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of August, A. D. 1914.

James S. Harlan,)	
Judson C. Clements,)	
Edgar E. Clark,)	
Charles C. McChord,)	Commissioners.
Balthasar H. Meyer,)	
Henry C. Hall,)	
Winthrop M. Daniels,)	

No. 5616.

Ballou & Wright

vs.

The New York, New Haven & Hartford Railroad Company; Boston & Albany Railroad Company; Boston & Maine Railroad; The New York Central & Hudson River Railroad Company; The Michigan Central Railroad Company; Central New England Railway Company; Erie Railroad Company; Chicago & Erie Railroad Company; The Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Chicago & North Western Railway Company; The Chicago, Rock Island & Pacific Railway Company; Union Pacific Railroad Company; Oregon Short Line Railroad Company; Spokane International Railway Company; and Oregon-Washington Railroad & Navigation Company.

ORDER AUTHORIZING REPARATION.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on February 3, 1914, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and this case now coming on to be considered in regard to an application for reparation thereon, and it appearing that the parties have filed an agreed statement-respecting the movements of the shipments involved and the amount of reparation due thereon, we find **on the basis of the Commission's report of reparation,** in the sum of \$828.13, with interest from January 1, 1913.

It is further ordered, That the New York, New Haven & Hartford Railroad Company; Boston & Albany Railroad Company; The New York Central & Hudson River Railroad Company; The Michigan Central Railroad Company; Chicago & North Western Railway Company; Union Pacific Railroad Company; Oregon Short Line Railroad Company; and Oregon-Washington Railroad & Navigation Company be, and they are hereby authorized and required, on or before October 1, 1914, to pay unto complainant, Ballou & Wright, the sum of \$463.10, with interest thereon at the rate of 6% per annum from January 1, 1913, as reparation on account of an unreasonable rate charged for the transportation of motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon, as more fully and at large appears in and by said report of the Commission and the statement filed of record.

It is further ordered, That the New York, New Haven & Hartford Railroad Company; Central New England Railway Company; Erie Railroad Company; Chicago & Erie Railroad Company; The Chicago, Rock Island & Pacific Railway Company; Union Pacific Railroad Company; Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company be and they are hereby authorized and required on or before October 1, 1914, to pay unto complainant, Ballou & Wright, the sum of \$206.15 with interest thereon at the rate of 6% per annum from January 1, 1913, as reparation on account of an unreasonable rate charged for the transportation of motorcycles in carloads, from Armory, Massachusetts to Portland, Oregon, as more fully and at large appears in and by said report of the Commission and the statement filed of record.

It is further ordered, That defendants, New York, New Haven & Hartford Railroad Company; Boston & Maine Railroad; The Canadian Pacific Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Spokane International Railway Company; and Oregon-Washington Railroad & Navigation Company be and they are hereby authorized and required on or before October 1, 1914, to pay unto complainant, Ballou & Wright, the sum of \$158.88 with interest thereon at the rate of 6% per annum from January 1, 1913, as reparation on account of an unreasonable rate charged for the transportation of motorcycles, in carloads from Armory, Massachusetts, to Portland, Oregon, as more fully and at large appears in and by said report of the Commission and the statement filed of record.

By the Commission:

That no application has ever been made by the said respondents or either thereof to set aside said report, decision, and order, or either thereof, of the said Commission, or for a rehearing of said cause, or of any matter determined therein, nor has the said Commission ever granted a rehearing of said cause, or reversed, changed, or modified the said report, decision, and order, or either thereof, but the same is now in full force and effect.

XVII.

That in and by the terms of the said order of reparation the said respondents mentioned in this cause of action were required to pay unto the said petitioner on or before the 1st day of October, 1914, the sum of \$463.10 with interest thereon at the rate of 6% per annum from January 1, 1913, as reparation on account of the said unreasonable rate charged for the transportation of motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon.

That the said report and order of reparation, were immediately after the dates thereof, served upon the said respondents and an immediate demand was made upon them that they comply with the said order of reparation of the said Interstate Commerce Commission and pay unto the said petitioner the said sum of \$463.10 with interest thereon at the rate of 6% per annum from the 1st day of January, 1913, as reparation on account of the said excessive, unjust and unreasonable rate charged and collected by the said respondents as aforesaid, but petitioner alleges: That the said respondents have, and each of them has, failed, neglected and refused, and

each of them still fails, neglects, and refuses to comply with the said order of the said Interstate Commerce Commission, or to obey the provisions thereof, or to pay the said petitioner the said sum of \$463.10 with said interest, or any part thereof.

XVIII.

That the sum of Three Hundred Dollars is a reasonable attorneys' fee in this action, to be taxed and collected as a part of the costs thereof.

XIX.

That there is now due and owing the said petitioner from the said respondents the said sum of \$463.10, together with interest thereon at the rate of 6% per annum from January 1, 1913, and the further sum of Three Hundred Dollars, a reasonable attorneys' fee herein.

The said petitioner, Ballou & Wright, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the city of Portland, Multnomah County, in the State of Oregon, and a citizen of and domiciled in the said State of Oregon, for its cause of action against the said respondents, The New York, New Haven & Hartford Railroad Company, a corporation; Central New England Railway Company, a corporation; Erie Railroad Company, a corporation; Chicago & Erie Railroad Company, a corporation; The Chicago, Rock Island & Pacific Railway Company, a corporation; Union Pacific Railroad Company, a corporation; Oregon Short Line Railroad Company, a corporation; Oregon-Washington Railroad & Navigation Company, a corporation, alleges:

I.

That said petitioner as a part of this cause of action re-alleges all of the allegations, matters, and things, contained in paragraphs I, II, III, IV, V, VI, VII and VIII of the preceding cause of action herein, and hereby refers to and adopts each of the said paragraphs as a part of this cause of action as fully and to the same extent as if each of the said foregoing paragraphs and matters therein alleged were particularly and fully set forth in this cause of action.

II.

That the said petitioner, on the dates hereinafter shown and set forth, caused to be delivered to the said respondent, The New York, New Haven & Hartford Railroad Company, at Armory, Massachusetts, and the said respondent on the said date received the certain carload shipment of motorcycles as hereinafter shown, for transportation and delivery to the said petitioner at Portland, Oregon; and thereafter the said respondent operating with said other respondents caused the said shipment to be delivered to the said petitioner at Portland, Oregon, about the 20th day of May, 1912.

III.

That at the time of the said shipment hereinafter shown and set forth dated May 1, 1912, The Trans-Continental Freight Bureau Westbound Tariff 4-I, I. C. C. 942, issued by R. H. Countiss, was in effect and carried a first class rate of \$3.00 per 100 pounds and the said first class rate from Armory, Massachusetts, to Portland, Oregon, then established and in force and effect was \$3.00 per 100 pounds. That at the time of

said shipment the said^d first class rate as shown by said tariff was just and reasonable and the same should have been applied to motorcycles in carloads.

IV.

That the said respondents charged and collected, and the said petitioner paid to the said respondents, under protest, on said shipment hereinafter shown a commodity carload rate of \$4.00 per 100 pounds, which said charge was and is excessive, unjust and unreasonable, and in violation of said Act to Regulate Commerce and acts amendatory thereof, and supplementary thereto, and particularly Section one thereof.

V.

That the following is a detailed statement as to the said shipment upon which reparation herein is claimed by the said petitioner against the said respondents, showing:

1. Point of origin of shipment and date thereof.
2. Waybill number and date thereof.
3. Car number and initial.
4. Carriers interested, and route and point of destination.
5. The weight and commodity rate charged and collected.
6. The weight and first class rate in effect and applicable to motorcycles in carloads, at the time of said shipment, and the amount which should have been collected and charged.
7. The amount of reparation due, based upon the first class rate in effect at the time of said shipment.
8. Amount of overcharge.

FROM
Armory, Mass.
5/1/12

WAYBILL
Maybrook
570-5/4/12

CAR
Erie-69062

VIA
New York, New Haven & Hartford
Railroad Company (Hartford), Central
New England Railway Company (May-
brook), Erie Railroad Company (Ma-
rion), Chicago & Erie Railroad Com-
pany (Chicago), Chicago, Rock Island
& Pacific Railway Company (Omaha),
Union Pacific Railroad Company
(Granger), Oregon Short Line Railroad
Company (Huntington), Oregon-
Washington Railroad & Navigation
Company (Portland).

Weight and Commodity Rate Charged and Collected

WEIGHT
20615 lbs.

RATE CHARGED
\$4.00 per 100 lbs.

AMOUNT COLLECTED
\$824.60

*Weight and First Class Rate in Effect, and Applicable to Motorcycles in Carloads,
at the Time of Said Shipment and the Amount Which Should Have Been
Charged and Collected.*

WEIGHT
20615 lbs.

RATE WHICH SHOULD
HAVE BEEN CHARGED
\$3.00 per 100 lbs.

AMOUNT WHICH SHOULD
HAVE BEEN COLLECTED
\$618.45

\$618.45

Total amount of overcharge.....\$206.15

VI.

That the foregoing shipment consisted of one carload of motorcycles which was moved over the lines of the said respondents as hereinbefore shown and mentioned; that the aggregate weight of the said shipments was Twenty Thousand Six Hundred and Fifteen pounds; and the said respondents charged and collected and the said petitioner paid, as freight for said service a commodity rate of \$4.00 per 100 pounds, or the total sum of Eight Hundred Twenty-four and 60/100 Dollars. That said petitioner paid to said respondent, under protest, the said excessive, unjust and unreasonable freight charges for said service at the City of Portland, Multnomah County, Oregon, between the 20th day of May, 1912, and the 1st day of June, 1912.

That based upon the first class rate which should have been applied to motorcycles in carloads at the time of the said shipment the amount which petitioner should have paid on said shipment was the sum of Six Hundred Eighteen and 45/100 Dollars, and no more. That the said rate charged and collected by the said respondents from the said petitioner was excessive, unjust, and unreasonable to the extent that it exceeded the said first class rate which should have been applied to motorcycles in carloads, and in effect at the time the said shipment was made.

That the difference between the amount so unjustly and unreasonably charged and collected by the said respondents and the amount the said petitioner would have paid at the said first class rate which should have been applied to motorcycles in carloads and which was then

in effect was, and is the sum of Two Hundred Six and 15/100 Dollars.

VII.

That by reason of the said excessive, unjust and unreasonable charge made and collected by said respondents for the said service the said petitioner has been damaged in the said sum of Two Hundred Six and 15/100 Dollars, being the difference between the amount actually charged and collected by the said respondents and paid by the said petitioner, and the reasonable amount which the said petitioner would have paid based upon the said first class rate at the time of said shipment which should have been applied to motorcycles in carloads.

VIII.

The said petitioner as a part of this cause of action re-alleges all of the allegations, matters, and things contained in paragraphs XV, XVa and XVI, of the preceding cause of action herein, and hereby refers to, and adopts each of the said paragraphs as a part of this cause of action as fully and to the same extent as if each of the said foregoing paragraphs, and matters therein alleged were particularly and fully set forth in this cause of action.

IX.

That in and by the terms of the said order of reparation the said respondents mentioned in this cause of action were required to pay unto the said petitioner on or before the 1st day of October, 1914, the sum of \$206.15 with interest thereon at the rate of 6% per annum from January 1, 1913, as reparation on account

of the said unreasonable rate charged for the transportation of motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon.

That the said report and order of reparation, were immediately after the dates thereof, served upon the said respondents and an immediate demand was made upon them that they comply with the said order of reparation of the said Interstate Commerce Commission and pay unto the said petitioner the said sum of \$206.15, with interest thereon at the rate of 6% per annum from the 1st day of January, 1913, as reparation on account of the said excessive, unjust and unreasonable rate charged and collected by the said respondents as aforesaid, but petitioner alleges: That the said respondents have, and each of them has, failed, neglected, and refused, and each of them still fails, neglects, and refuses to comply with the said order of the said Interstate Commerce Commission, or to obey the provisions thereof, or to pay the said petitioner the said sum of \$206.15 with said interest, or any part thereof.

X.

That the sum of One Hundred Dollars is a reasonable attorneys' fee in this action, to be taxed and collected as a part of the costs thereof.

XI.

That there is now due and owing the said petitioner from the said respondents the said sum of \$206.15, together with interest thereon at the rate of 6% per annum from January 1, 1913, and the further sum of One Hundred Dollars, a reasonable attorneys' fee herein.

The said petitioner, Ballou & Wright, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon with its principal office and place of business in the City of Portland, Multnomah County, in the State of Oregon, and a citizen of, and domiciled in the said State of Oregon, for its cause of action against the said respondents, The New York, New Haven & Hartford Railroad Company, a corporation; Boston & Maine Railroad, a corporation; The Canadian Pacific Railway Company, a corporation; The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation; Spokane International Railway Company, a corporation; Oregon-Washington Railroad & Navigation Company, a corporation, alleges:

I.

That the said Ballou & Wright, is now, and was at all of the time herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon with its principal office and place of business at the City of Portland, in Multnomah County, State of Oregon, and as such corporation, is now, and was at all of the times herein mentioned, a citizen of, and domiciled in the said State of Oregon.

II.

That the said respondent, Oregon-Washington Railroad & Navigation Company, is now, and was at all of the times herein mentioned, a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon with its principal office, and place of business and with its principal operating office at Port-

land, Multnomah County, State of Oregon, and as such corporation, is now, and was at all of the times herein mentioned, a citizen of, and domiciled in, the said State of Oregon. That the said reseedent, Oregon-Washington Railroad & Navigation Company, was at all of the times herein stated, the terminal company which in conjunction with the said other respondents, moved the shipments hereinafter mentioned.

III.

That the said respondent, Canadian Pacific Railway Company, is now, and was at all of the times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the Dominion of Canada, with its principal office and place of business at Montreal in the Dominion of Canada, and as such corporation, it is now, and it was at all of the times herein mentioned, a citizen of, and domiciled in, the said Dominion of Canada.

IV.

The said petitioner as a part of this cause of action re-alleges all of the allegations, matters, and things contained in paragraphs VI, VII and VIII of the first cause of action herein and hereby refers to and adopts each of the said paragraphs as a part of this cause of action as fully and as to the same extent, as if each of the said foregoing paragraphs and matters therein alleged were particularly and fully set forth in this cause of action.

V.

That the said petitioner on the several dates hereinafter shown and set forth, caused to be delivered to the said

respondent, The New York, New Haven & Hartford Railroad Company, at Armory, Massachusetts, and the said respondent on the said several dates received, the certain carload shipments of motorcycles as hereinafter shown, for transportation and delivery to the said petitioner at Portland, Oregon; and thereafter the said respondent operating with said other respondents, caused the said shipment to be delivered to the said complainant and petitioner, at Portland, Oregon, about May 20th, 1912.

VI.

That at the time of the said shipment hereinafter shown and set forth, dated April 19, 1912, The Trans-Continental Freight Bureau Westbound Tariff 4-I, I. C. C. 942, issued by R. H. Countiss, was in effect and carried a first class rate of \$3.00 per 100 pounds, and the said first class rate from Armory, Massachusetts, to Portland, Oregon, then established and in force and effect was \$3.00 per 100 pounds.

That at the time of said shipment the said first class rate as shown by said tariff was just and reasonable and the same should have been applied to motorcycles in carloads.

VII.

That the said respondents charged and collected, and the said petitioner paid to the said respondents, under protest, on said shipment hereinafter shown a commodity carload rate of \$4.00 per 100 pounds, which said charge was and is excessive, unjust and unreasonable, and in violation of said Act to Regulate Commerce and acts

amendatory thereof, and supplementary thereto, and particularly Section one thereof.

VIII.

That the following is a detailed statement as to the said shipment upon which reparation herein is claimed by the said petitioner against the said respondents, showing:

1. Point of origin of shipment and date thereof.
2. Waybill number and date thereof.
3. Car number and initial.
4. Carriers interested, and route and point of destination.
5. The weight and commodity rate charged and collected.
6. The weight and first class rate in effect and applicable to motorcycles in carloads at the time of said shipment, and the amount which should have been collected and charged.
7. The amount of reparation due, based upon the first class rate in effect at the time of said shipment.
8. Amount of overcharge.

FROM	CAR	VIA
Armory, Mass.	NH-85911	The New York, New Haven & Hartford Railroad Company (Fitchburg),
4/19/12	WAYBILL	Boston & Maine Railroad (Newport),
	F-203-4/19/12	Canadian Pacific Railway (Sault Ste. Marie), Minneapolis, St. Paul & Sault Ste. Marie Railway Company (Portal),
		Canadian Pacific Railway (Kingsgate),
		Spokane International Railway Company (Spokane), Oregon-Washington Railroad & Navigation Company (Portland).

Weight and Commodity Rate Charged and Collected.

WEIGHT	RATE CHARGED.	AMOUNT COLLECTED
15888 lbs.	\$4.00 per 100 lbs.	\$635.52

Weight and First Class Rate in Effect and Applicable to Motorcycles in Carloads, at the Time of Said Shipments, and the Amount Which Should Have Been Charged and Collected.

WEIGHT	RATE WHICH SHOULD HAVE BEEN CHARGED	AMOUNT WHICH SHOULD HAVE BEEN COLLECTED
15888 lbs.	\$3.00 per 100 lbs.	\$476.64
		\$476.64

Total overcharge..... 158.88

IX.

That the foregoing shipment consisted of one carload of motorcycles which was moved over the lines of the said respondents as hereinbefore shown and mentioned. That the aggregate weight of the said shipment was 15,888 pounds, and the said respondents charged and collected and the said petitioner paid as freight for said service a commodity rate of \$4.00 per 100 pounds, or the total sum of Six Hundred Thirty-five and 52/100 Dollars.

That the said petitioner, paid the said respondents, under protest, the said excessive, unjust and unreasonable freight charges for said services at the City of Portland, Multnomah County, Oregon, between the 20th day of May, 1912, and the 1st day of June, 1912.

That based upon the first class rate which should have been applied to motorcycles in carloads at the time of said shipment, the sum which petitioner should have paid on said shipment was the sum of Four Hundred and Seventy-six and 64/100 Dollars, and no more. That the said rate charged and collected by the said respondents from the said petitioner was excessive, unjust, and unreasonable to the extent that it exceeded the first class rate which should have been applied to motorcycles in carloads and in effect at the time of the said shipment was made.

That the difference between the amount so unjustly and unreasonably charged and collected by the said respondents and the amount the said petitioner would have paid at the said first class rate which should have been applied to motorcycles in carloads and which was then

in effect was, and is, the sum of One Hundred Fifty-eight and 88/100 Dollars.

X.

That by reason of the said excessive, unjust and unreasonable charge made and collected by said respondents for the said service the said petitioner has been damaged in the said sum of One Hundred Fifty-eight and 88/100 Dollars, being the difference between the amount actually charged and collected by the said respondents and paid by the said petitioner, and the reasonable amount which the said petitioner would have paid based upon the said first class rate at the time of said shipment which should have been applied to motorcycles in carloads.

XI.

The said petitioner as a part of this cause of action re-alleges all of the allegations, matters, and things, contained in paragraphs XV, XVa and XVI of the first cause of action herein and hereby referred to, and adopts each of the said paragraphs as a part of this cause of action as fully and to the same extent as if each of the said foregoing paragraphs, and matters therein alleged were particularly and fully set forth in this cause of action.

XII.

That in and by the terms of the said order of reparation the said respondents mentioned in this cause of action were required to pay unto the said petitioner on or before the 1st day of October, 1914, the sum of \$158.88, with interest thereon at the rate of 6% per annum from January 1, 1913, as reparation on account

of the said unreasonable rate charged for the transportation of motorcycles in carloads from Armory, Massachusetts, to Portland, Oregon.

That the said report and order of reparation, were immediately after the dates thereof, served upon the said respondents and an immediate demand was made upon them that they comply with the said order of reparation of the said Interstate Commerce Commission and pay unto the said petitioner the said sum of \$158.88 with interest thereon at the rate of 6% per annum from the 1st day of January, 1913, as reparation on account of the said excessive, unjust and unreasonable rate charged and collected by the said respondents as aforesaid, but petitioner alleges: That the said respondents have, and each of them has, failed, neglected, and refused, and they and each of them still fails, neglects, and refuses to comply with the said order of the said Interstate Commerce Commission or to obey the provisions thereof, or to pay the said petitioner the said sum of \$158.88 with interest, or any part thereof.

XIII.

That the sum of One Hundred Dollars is a reasonable attorneys' fee in this action, to be taxed and collected as a part of the costs thereof.

XIV.

That there is now due and owing the said petitioner from the said respondents and the said sum of \$206.15, together with interest thereon at the rate of 6% per annum from January 1, 1913, and the further sum of One Hundred Dollars, a reasonable attorneys' fee herein.

WHEREFORE, petitioner demands judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & North Western Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, for the said sum of \$463.10 with interest thereon at the rate of 6% per annum from the 1st day of January, 1913, and the further sum of \$300.00 as attorneys' fee herein and for its costs and disbursements in this action.

And petitioner demands judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, The Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, for the said sum of \$206.15 with interest thereon at the rate of 6% per annum from the 1st day of January, 1913, and the further sum of \$100.00 as attorneys' fees herein, and for its costs and disbursements in this action.

And the said petitioner demands judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, The Canadian Pacific Railway Company, The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company, and Oregon-

Washington Railroad & Navigation Company, for the said sum of \$158.88, together with interest thereon at the rate of 6% per annum from the 1st of January, 1913, and for a further sum of \$100.00 as attorneys' fees herein and for its costs and disbursements in this action.

WILLIAM H. BARD and
JAMES E. FENTON,
Attorneys for Petitioner.

United States of America,
District of Oregon,
County of Multnomah—ss.

I, C. F. Wright, being duly sworn depose and say that I am the Vice-President of the said petitioner, and make this verification for and on its behalf. That I have read the foregoing petition, know the contents thereof, and the same is, and the allegations therein are true, as I verily believe.

C. F. WRIGHT.

Subscribed and sworn to before me this 3d day of June, 1915.

(Seal)

W. H. BARD,
Notary Public for the State of Oregon.
Residence at Portland, Oregon.

Filed June 3, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 20th day of December, 1915, there was duly filed in said Court, and cause, the Answer of Boston & Maine Railroad Company et al, and Amended Answer of Oregon-Washington Railroad & Navigation Company et al, in words and figures as follows, to-wit:

**ANSWER OF BOSTON & MAINE RAILROAD
COMPANY, ET AL. AND AMENDED
ANSWER OF OREGON-WASHING-
TON RAILROAD AND NAVIGA-
TION COMPANY, ET AL.**

Boston & Maine Railroad, The Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company and Spokane International Railway Company, for answer to petitioner's third cause of action; Oregon Short Line Railroad Company and Union Pacific Railroad Company, for amended answer to petitioner's first and second causes of action; and Oregon-Washington Railroad & Navigation Company, for amended answer to petitioner's first, second and third causes of action, admit, deny and allege, as follows: (The following paragraphs from number I to number XVIII inclusive pertain to first cause of action.)

I.

Admit the allegations contained in paragraph I of the petition.

II.

Admit the allegations of paragraphs II and III of the petition.

III.

Admit the allegations of paragraphs IV and V of the petition.

IV.

Answering paragraph VI of the petition these respondents allege that they have no knowledge or information sufficient to form a belief as to whether either or any of the allegations contained in paragraph VI of the petition are true, and, therefore, deny the same and the whole thereof.

V.

Answering paragraph VII of the petition, these respondents admit the allegations therein contained, except that it is alleged that they have no knowledge or information sufficient to form a belief as to whether petitioner had or has a large and extensive trade or any trade in said business in the State of Oregon, and in other States on the Pacific Coast, and, therefore, deny the same.

VI.

Admit the allegations of paragraph VIII of the petition, except that it is denied that these respondents are common carriers between Armory and other points in the State of Massachusetts, and the City of Portland, in Multnomah County, or other points in the State of Oregon.

VII.

Deny each and every allegation contained in paragraph IX of the petition.

VIII.

Answering paragraph X of the petition these respondents admit the allegations therein contained, except that it is denied that at the time of said shipments the first class rates as shown by said tariff were or are just or reasonable when applied to the transportation of motorcycles in carload lots between Armory, Mass., and Portland, Oregon, and denies that said first class rates should have been applied to the shipments of motorcycles made by the petitioner between the dates mentioned in this complaint.

IX.

Deny each and every allegation contained in paragraph XI of the petition, except that it is admitted that the respondents charged and collected on said shipments of motorcycles, made by the petitioner, a commodity carload rate of \$4.00 per cwt. which rate was the only lawful rate applicable to said shipments.

X.

Deny each and every allegation contained in paragraph XII of the petition.

XI.

Deny each and every allegation contained in paragraph XIII of the petition.

XII.

Deny each and every allegation contained in paragraph XIV of the petition.

XIII.

Answering paragraph XV of the petition, these respondents admit that the petitioner heretofore and on or

about the 10th day of March, 1913, filed with the Interstate Commerce Commission a petition alleging the unreasonableness of the rates charged for the transportation of motorcycles in carload lots between Armory, Mass., and Portland, Oregon, which petition is substantially as set forth in said paragraph XV.

XIV.

Answering paragraph XV (a) of the petition, these respondents admit that upon said petition and answers of the respondents named in petition before the Interstate Commerce Commission and the issues thereby enjoined, the Interstate Commerce Commission did render its opinion dated February 3, 1914, which opinion is substantially as set forth in said paragraph XV (a), but this defendant alleges that said Commission in the rendition of its decision erred in finding that the commodity rate of \$4.00 charged for the transportation of motorcycles in carload lots was unreasonable, that the complainant therein was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first class rate contemporaneously in effect and that the petitioner was therefore entitled to an award of reparation; and alleges that said decision of the Interstate Commerce Commission insofar as it purports to find that the petitioner herein was damaged by the assessment and collection of the charges on carload shipments of motorcycles between Armory, Mass., and Portland, Oregon, as assessed and collected by the respondent railroad companies was not founded upon fact but was contrary to the evidence submitted before said Commission, and the conclusions to

be rightfully deduced therefrom; these respondents deny that petitioner suffered any damage by reason of the payment of charges based on said commodity rate of \$4.00 and allege that petitioner suffered no damage by reason thereof.

XV.

Answering paragraph XVI of the petition these respondents admit that subsequent to the rendering of its opinion, as set forth in paragraph XV (a) of the petition, and on or about the 14th day of August, 1914, the said Interstate Commerce Commission made and entered its decision and order of reparation which decision and order is substantially as set forth in said paragraph XVI of the petition, but these respondents allege that said decision and order insofar as same purport to find that the petitioner herein was damaged by reason of the exaction and collection of the commodity rate of \$4.00 per cwt. on carload shipments of motorcycles between Armory, Mass., and Portland, Oregon, was not founded upon fact and was not the correct conclusion to be arrived at from the evidence submitted before the Commission, and that the said Interstate Commerce Commission erred in finding that said petitioner had been damaged as stated in their decision and order for reparation or in any other sum or sums whatsoever, and these respondents allege that petitioner suffered no damage whatsoever by reason of the payment of charges as assessed and collected on said shipments.

XVI.

Admits the allegations contained in paragraph XVII of the petition, except that it is denied that the

charges assessed and collected by these respondents for the transportation of motorcycles were excessive, unjust or unreasonable.

XVII.

Deny each and every allegation contained in paragraph XVIII of the petition.

XVIII.

Deny each and every allegation contained in paragraph XIX of the petition.

Answering petitioner's second cause of action, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington & Navigation Company admit, deny and allege:

I.

Answering paragraph I of the petitioner's second cause of action, these respondents incorporate herein as their answer to said paragraph the answers made to paragraphs I, II, III, IV, V, VI, VII and VIII of petitioner's preceding and first cause of action, and refer to said answers and each of them and adopt each of said answers as the answer to this paragraph as fully and to the same intent as if each of the answers to said paragraphs herein specified were set out at length.

II.

Answering paragraph II of the second cause of action, these respondents admit that the petitioner heretofore caused to be delivered to the New York, New Haven & Hartford Railroad Company at Armory, Mass., certain carload shipments of motorcycles, said

shipments being consigned to the petitioner at Portland, Oregon, which shipments were received by the New York, New Haven & Hartford Railroad Company and by it and its connecting lines of railroad thereafter transported and were delivered to the petitioner at Portland, Oregon; but as to the correctness the statement of shipments shown in said second cause of action, these respondents have no knowledge or information sufficient to form a belief and therefore deny the same.

III.

These respondents admit the allegations of paragraph III of the second cause of action except that it is denied that the first class rate of \$3.00 per cwt. applicable between Armory, Mass., and Portland, Oregon, as shown by the tariffs mentioned in said paragraph should have been applied to carload shipments of motorcycles between said points and between said dates.

IV.

Answering paragraph IV of petitioner's second cause of action, these respondents deny each and every allegation therein contained, except that it is admitted that the respondents charged and collected and the petitioner paid to the respondents for the transportation of carload shipments of motorcycles between the points hereinbefore referred to, the commodity rate of \$4.00 per cwt.

V.

Answering paragraph V of the petitioner's second cause of action these respondents admit that certain shipments of motorcycles were made between said points and on or about the date shown in said paragraph, but as to

the correctness of said statement these respondents have no knowledge or information sufficient to form a belief and therefore deny the same.

VI.

Answering paragraph VI of the petitioner's second cause of action these respondents deny each and every allegation therein contained, except that it is admitted for the service of transportation of motorcycles in car-load lots between Armory, Mass., and Portland, Oregon, the respondents assessed and collected charges at the rate of \$4.00 per cwt.

VII.

Answering paragraph VII of the second cause of action, these respondents deny each and every allegation therein contained.

VIII.

Answering paragraph VIII of petitioner's second cause of action these respondents make as their answer to said paragraph the answers made to paragraphs XV, XV (a) and XVI of petitioner's preceding and first cause of action, and refer to said answers and each of them and adopt said answers and each of them as their answer to this paragraph as fully and to the same intent as if each of said answers to said paragraphs here specified were here set out at length.

IX.

Admit the allegations contained in paragraph IX of the second cause of action, except that it is denied that the rates assessed and collected by these respondents for the transportation of motorcycles were excessive, unjust or unreasonable.

X.

Deny the allegations contained in pargarph X of the second cause of action.

XI.

Deny the allegations contained in paragraph XI of the second cause of action.

Answering petitioner's third cause of action, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, admit, deny and allege:

I.

Admit the allegations contained in paragraphs I, II and III of said third cause of action.

II.

Answering paragraph IV of petitioner's third cause of action, these respondents hereby incorporate and make as their answer to said paragraph IV the answers and each of them heretofore made to paragraphs VI, VII and VIII of petitioner's first cause of action, and hereby refer to and adopt each and every of said answers fully and to the same intent as if each of the answers to paragraphs VI, VII and VIII of petitioner's first cause of action were here set out at length.

III.

Answering paragraph V of the petitioner's third cause of action, these respondents admit that heretofore the petitioner caused to be delivered to the New York, New Haven & Hartford Railroad Company, at

Armory, Mass., certain carload shipments of motorcycles to be transported over the line of said railroad company and its connecting carriers and delivered to the petitioner at Portland, Oregon, which said shipments were so transported and delivered, but as to the correctness of the statement of shipments shown in said third cause of action, these respondents have no information or knowledge or information sufficient to form a belief and therefore deny the same.

IV.

Answering paragraph VI, of the third cause of action, these respondents admit the allegations therein contained, except that it is denied that the first class rate as shown by said tariffs should have been applied to the movement of carload shipments of motorcycles between Armory, Mass., and Portland, Oregon.

V.

Deny each and every allegation contained in paragraph VII of petitioner's third cause of action.

VI

Answering paragraph VIII of petitioner's third cause of action these respondents allege that as to the correctness of the statement therein set out they have no knowledge or information sufficient to form a belief and therefore deny the same.

VII.

Answering paragraph IX of the petitioner's third cause of action, these respondents deny each and every allegation therein contained, except that it is admitted that the respondents charged and collected and the peti-

tioner paid for the transportation of motorcycles between Armory, Mass., and Portland, Ore., the commodity rate of \$4.00 per cwt.

VIII.

Deny each and every allegation contained in paragraph X of petitioner's third cause of action.

IX.

Answering paragraph XI of petitioner's third cause of action, these respondents make as their answer to said paragraph the answers made to paragraphs XV, XV (a) and XVI of petitioner's first cause of action, and refer to said answers and each of them and adopt said answers and each of them as their answers to this paragraph as fully and to all intents as if each of said answers to said paragraphs here specified were here set out at length.

X.

Admit the allegation of paragraph XII of petitioner's third cause of action, except that it is denied that the charges assessed and collected by these respondents for the transportation of motorcycles were excessive, unjust or unreasonable.

XI.

Deny each and every allegation contained in paragraph XIII of petitioner's third cause of action.

XII.

Deny each and every allegation contained in paragraph XIV of petitioner's third cause of action.

Respondents, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company for a further and separate answer and defense to petitioner's first cause of action allege:

I.

That heretofore and between March 25, 1911, and January 1, 1913, there were transported over through routes from Armory, Mass., to Portland, Oregon, of which through routes the lines of railroad of the respondents Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company constituted a part, various carload shipments of motorcycles, consigned to the petitioner at Portland; that on every of said shipments of motorcycles there were assessed and collected, and the petitioner paid charges bases on a rate of \$4.00 per hundred pounds, which rate was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Mass., to Portland, Oregon.

II.

That by the payment of charges as alleged in the preceding paragraph, petitioner has in no wise been damaged, nor has petitioner been injured thereby to any extent whatsoever.

Respondents, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington & Navigation Company for a second, further and separate answer and defense to petitioner's first cause of action, allege:

I.

That theretofore and between March 25, 1911, and January 1, 1913, there were transported over through routes from Armory, Mass., to Portland, Ore., of which through routes the lines of railroad of the respondents, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company constituted a part, various carload shipments of motorcycles, consigned to the petitioner at Portland; that on every of said shipments of motorcycles there were assessed and collected, and the petitioner paid charges based on a rate of \$4.00 per hundred pounds, which rate was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Mass., to Portland, Oregon.

II.

That the said rate of \$4.00 per hundred pounds so charged and paid for the transportation of motorcycles in carload lots from Armory, Mass., to Portland was a just and reasonable rate therefor.

Respondents, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company for a further and separate answer and defense to petitioner's second cause of action allege:

I.

That heretofore and between March 25, 1911, and January 1, 1913, there were transported over through routes from Armory, Mass., to Portland, Oregon, of

which through routes the lines of railroad of the respondents, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company constituted a part, various carload shipments of motorcycles, consigned to the petitioner at Portland; that on every of said shipments of motorcycles there were assessed and collected, and the petitioner paid charges based on a rate of \$4.00 per hundred pounds, which rate was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Mass., to Portland, Oregon.

II.

That by the payment of charges as alleged in the preceding paragraph, petitioner has in no wise been damaged, nor has petitioner been injured thereby to any extent whatsoever.

Respondents, Boston & Maine Railroad, The Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company for a further and separate answer and defense to petitioner's third cause of action allege:

I.

That heretofore and between March 25, 1911, and January 1, 1913, there were transported over through routes from Armory, Mass., to Portland, Oregon, of which through routes the lines of railroad of the respondents, Boston & Maine Railroad, The Canadian

Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company constituted a part, various carload shipments of motorcycles, consigned to the petitioner at Portland; that on every of said shipments of motorcycles there were assessed and collected, and the petitioner paid charges based on a rate of \$4.00 per hundred pounds, which rate was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Mass., to Portland, Oregon.

II.

That by the payment of charges as alleged in the preceding paragraph, petitioner has in no wise been damaged, nor has petitioner been injured thereby to any extent whatsoever.

Respondents, Boston & Maine Railroad, The Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company for a second further and separate answer and defense to petitioner's third cause of action allege:

I.

That heretofore and between March 25, 1911, and January 1, 1913, there were transported over through routes from Armory, Mass., to Portland, Oregon, of which through routes the lines of railroad of the respondents, Boston & Maine Railroad, The Canadian Pacific

Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company constituted a part, various carload shipments of motorcycles, consigned to the petitioner at Portland; that on every of said shipments of motorcycles there were assessed and collected, and the petitioner paid charges based on a rate of \$4.00 per hundred pounds, which rate was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Mass., to Portland, Oregon.

II.

That the said rate of \$4.00 per hundred pounds so charged and paid for the transportation of motorcycles in carload lots from Armory, Mass., to Portland, was a just and reasonable rate therefor.

WHEREFORE, having fully answered petitioner's petition herein, these respondents pray that the same be dismissed.

A. C. SPENCER,
C. E. COCHRAN,
A. W. HAWKINS,

Attorneys for Boston & Maine Railroad, The Canadian Pacific Railway Company, Minneapolis, St. P. & S. S. M. Ry. Co., Spokane International Railway Company, Union Pacific Ry Co., Oregon Short Line Ry. Co., and Oregon-Washington Railroad & Navigation Company.

State of Oregon,

County of Multnomah—ss.

A. C. SPENCER, being first duly sworn, on oath deposes and says: that he is Assistant Secretary and General Attorney for Oregon-Washington Railroad & Navigation Company, one of the respondents above named; that he has read the foregoing answer and amended answer, knows the contents thereof, and the same is true as he verily believes.

A. C. SPENCER,

Subscribed and sworn to before me this 20th day of December, 1915.

A. W. HAWKINS,

Notary Public for Oregon.

My Commission Expires March 12, 1916.

(Seal)

Service by copy admitted at Portland, Ore., December 20, 1915.

WILL H. BARD,

Solicitor for Plaintiff.

Filed December 20, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 11th day of February, 1916, there was duly filed in said Court and cause, an Appearance and Answer of New York, New Haven and Hartford Railroad Company et al, in words and figures as follows, to-wit:

**APPEARANCE AND ANSWER OF NEW YORK,
NEW HAVEN AND HARTFORD RAIL-
ROAD COMPANY, ET AL.**

The New York, New Haven & Hartford Railroad Company, New York Central Railroad Company, Michigan Central Railroad Company, Erie Railroad Company, Chicago and Erie Railroad Company, Central of New England Railway Company, Chicago & Northwestern Railroad Company, Chicago, Rock Island & Pacific Railroad Company and J. M. Dickinson, Receiver thereof, and Boston and Albany Railroad Company, respondents in the above entitled action, by their attorney, waiving service of summons herein, hereby enter and make their appearance, and the appearance of each of them; and said respondents and each of them hereby adopt and make as their own the amended answer heretofore filed in this proceeding by and on behalf of the Boston and Maine Railroad Company, the Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, the same and of the same affect as if the respondents

first above named had joined in said answer, as the same may be applicable to each.

A. W. HAWKINS,
Of Attorneys for—

The New York, New Haven & Hartford Railroad Co.,
New York Central R. R. Co., Michigan Central
R. R. Co., Erie R. R. Co., Chicago & Erie R. R. Co.,
Central of New England Railway Co., Chicago &
Northwestern R. R. Co., Chicago, Rock Island &
Pacific R. R. Co., and J. M. Dickinson, Receiver
thereof, and Boston and Albany R. R. Co.

Filed February 11, 1916. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 11th day of February,
1916, there was duly filed in said Court and cause,
a Stipulation to try the cause without the interven-
tion of a jury, in words and figures as follows, to-
wit:

STIPULATION WAIVING JURY.

It is stipulated and agreed by and between the at-
torneys for the above named Petitioner and the attor-
neys for the above named respondents, that the issues
of fact in the above entitled cause may be tried and de-
termined by the above entitled Court without the inter-
vention of a jury, and a trial and determination thereof
by a jury is hereby expressly waived.

WILL H. BARD,
JAMES E. FENTON,

Attorneys for Petitioner.

A. C. SPENCER and A. W. HAWKINS,
Attorneys for Respondents.

Filed February 11, 1916. G. H. MARSH, Clerk.

And afterwards, to-wit, on Monday, the 14th day of February, 1916, the same being the 91st judicial day of the regular November term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER TO AMEND PETITION.

Now, at this time, February 14th, 1916, upon motion of James E. Fenton, of counsel for petitioner, and no objection being made thereto,

IT IS ORDERED that the title to the above entitled cause be and the same is hereby amended by adding thereto, under the name of the defendant Chicago, Rock Island & Pacific Railway Company, a corporation, the following: "and J. M. Dickinson, Receiver thereof."

And afterwards, to-wit, on Wednesday, the 16th day of February, 1916, the same being the 93rd judicial day of the regular November term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**ORDER TO AMEND PETITION BY
INTERLINEATION.**

**ORDER TO FILE AMENDMENT TO
AMENDED ANSWER.**

Now, at this day, comes the plaintiff by Mr. James E. Fenton, and Mr. W. H. Bard, of counsel and the defendant by Mr. Charles E. Cochran and Mr. A. W. Hawkins, of counsel, whereupon on motion of said plaintiff it is ordered that it be, and it is hereby allowed to amend by interlineation its complaint herein by inserting in Paragraph six on page four the following, viz.: "that J. M. Dickinson is now and was at all times herein stated the duly qualified and acting receiver of the said Chicago, Rock Island and Pacific Railway Company." It is further ordered that said plaintiff be, and it is hereby permitted to sue the said receiver. And on motion of the defendants it is ordered that they be, and they are hereby allowed to file an amendment to the amended answer herein and that the amendment now filed be substituted for the amendment to said amended answers heretofore filed and it is further ordered that said plaintiff be, and it is hereby allowed to file a reply herein.

And afterwards, to-wit, on the 16th day of February, 1916, there was duly filed in said Court and cause, an Amendment to Answer, in words and figures as follows, to-wit:

AMENDMENT TO ANSWER.

Respondents for amendment to the amended answer heretofore filed in the above entitled cause, and as their first, further and separate answer and defense to the three causes of action stated in petitioner's petition, allege:

I.

That heretofore and between March 25, 1911, and January 1, 1913, the shipments of motorcycles referred to in each cause of action set forth in plaintiff's complaint, constituted the carload shipments of motorcycles consigned to the petitioner at Portland, Oregon; that on every of said shipment of motorcycles there were assessed and collected by the defendants and the petitioner paid as freight thereon, the sum of Four (\$4.00) Dollars per hundred pounds, which said amount was and is the lawful rate as published and filed with the Interstate Commerce Commission applicable to the transportation of motorcycles in carload lots from Armory, Massachusetts to Portland, Oregon.

II.

At Armory, Massachusetts, is located the factory which manufactured the motorcycles in question in this case, and the petitioner is engaged in the distribution, sale and delivery of said motorcycles to the trade at and in the vicinity of Portland, Oregon, and that the plaintiff and petitioner after the receipt of each and all of said

motorcycles did distribute, sell and deliver the same and the whole thereof to the trade at Portland, Ore., and the vicinity thereof, constituting the district in which petitioner's trade and customers were located, which includes the State of Oregon and other of the Pacific Coast states; that it was the custom of the petitioner, in the prosecution of its said business in the distribution, sale and delivery of said motorcycles, to fix a price to the trade as to each and all of said motorcycles, which included its own profit, the freight paid and the factory price to it, and that in the transaction of said business the petitioner's profit was not in any respect reduced by the amount of said freight rate or tariff applicable to said shipments; that as a matter of fact the amounts sought to be recovered by the petitioner herein is the difference in freight charges on said shipments of motorcycles based upon and calculated at the rate of Four (\$4.00) Dollars per hundred pounds, and the amounts constituting the rate and tariff assessable thereon, computed at and based upon the rate found and held to be reasonable by the Interstate Commerce Commission for the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon, and that the petitioner in the management of its said business did sell said motorcycles and the whole thereof to the trade at a retail price on each motorcycle of Fifteen (\$15.00) Dollars in excess of the factory list price, and which said sum was assessed and added to cover and which did cover all freight charges under said tariff so complained of herein upon each motorcycle, and which included and covered the difference in freight charges now sought as damages by the petitioner.

III.

Respondents further aver that by reason of the plan and method formed and adopted by the petitioner in the transaction of said business of the purchase, sale and distribution of said motorcycles it has, by reason of said freight rate, been damaged in no sum whatever.

W. W. COTTON,

A. W. HAWKINS,

C. E. COCHRAN,

Attorneys for Respondents.

Due service by copy admitted at Portland, Or.,
February 16, 1915.

JAMES E. FENTON,

Solicitor for Petitioner.

Filed February 16, 1916. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 17th day of February, 1916, there was duly filed in said Court and cause, a Demurrer to Answer, in words and figures as follows, to-wit:

DEMURRER TO ANSWER.

Comes now the above named petitioner and demurs separately to the first and second further and separate answer and defense of the respondents to petitioner's first cause of action, and to the first further and separate answer and defense of the respondents to petitioner's second cause of action; and to the first and second further and separate answer and defense of the respondents to petitioner's third cause of action; and to the further and separate answer and defense of the said respondents as set forth in their amendment to their

amended answer herein, to the three causes of action of the petitioner herein.

And for grounds of said demurrer the said petitioner alleges that the said further and separate defenses do not, nor does either of them, state facts sufficient to constitute a defense or counterclaim or a confession or avoidance of the causes of action, or either of them, set forth in the petition of petitioner herein.

W. H. BARD and
JAMES E. FENTON,
Attorneys for Petitioner.

United States of America,
State of Oregon,
County of Multnomah—ss.

I, James E. Fenton, do hereby certify that I prepared the foregoing demurrer and that the same is not interposed for the purpose of delay, and in my opinion the same is well founded in point of law.

JAMES E. FENTON.

District of Oregon,
County of Multnomah—ss.

Due service of the within demurrer is hereby accepted in Multnomah County, Oregon, this 15th day of February, 1916, by receiving a copy thereof, duly certified to as such by James E. Fenton, of Attorneys for petitioner.

C. E. COCHRAN,
Of Attorneys for Respondents.

Filed February 17, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Thursday, the 17th day of February, 1916, the same being the 94th judicial day of the regular November, 1916, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER ON DEMURRER TO ANSWER.

Now, at this time, February 17, 1916, this cause coming on to be heard upon the demurrer of the above named petitioner to the further and separate defenses of the respondents above named to the petition of petitioner herein, and to the last amendment to the amended answer of the respondents herein, the petitioner appearing by Will H. Bard and James E. Fenton, its attorneys, and the respondents appearing by C. E. Cochran and A. W. Hawkins, their attorneys, and the court having heard the arguments in support of and against the said demurrer, and being fully advised in the premises.

IT IS ORDERED that the said demurrer to the said last amendment to the amended answer herein be and the same is hereby sustained, and that the said demurrer to the said further and separate defenses of the respondents as set forth in the original amended answer herein, be and the same is hereby overruled.

CHAS. E. WOLVERTON,
Judge.

Filed February 17, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 17th day of February, 1916, there was duly filed in said Court and cause, a Reply, in words and figures as follows, to-wit:

REPLY.

The petitioner for its reply to the first further and separate answer and defense of the respondents to the first cause of action herein, admits, alleges and denies as follows, to-wit:

I.

It denies that the rate of \$4.00 per hundred pounds was or is the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon.

II.

It denies that by the payment of the said rate of \$4.00 per hundred pounds, petitioner has in no wise been damaged or injured thereby to any extent whatever, but petitioner alleges that by the payment of the said rate it has been damaged in the sum and amount alleged in its petition herein.

The said petitioner for its reply to the second further and separate answer and defense of the respondents to the first cause of action herein, admits, alleges and denies as follows, to-wit:

I.

It denies that the rate of \$4.00 per hundred pounds was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon.

II.

It denies that the said rate of \$4.00 per hundred pounds charged and paid by petitioner for the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon, was a just or reasonable rate therefor, and in this behalf it alleges that the said rate was unjust and unreasonable to the amount and extent alleged in its petition herein.

The said petitioner for its reply to the first further and separate answer and defense of respondents to the second cause of action herein, admits, alleges and denies as follows, to-wit:

I.

It denies that the rate of \$4.00 per hundred pounds was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon.

II.

It denies that by the payment of said rate, petitioner has in no wise been damaged or injured thereby to any extent whatever, and in this respect it alleges that it has been damaged and injured by the payment of said rate to the extent and amount alleged in its petition herein.

The said petitioner for its reply to the first further and separate answer and defense of the respondents to the third cause of action herein, admits, alleges and denies as follows, to-wit:

I.

It denies that the rate of \$4.00 per hundred pounds

was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon.

II.

It denies that by the payment of the said rate, petitioner has in no wise been damaged or injured thereby to any extent whatever, but it alleges that by the payment of said rate it has been damaged and injured to the extent and amount alleged in its petition herein.

The said petitioner for its reply to the second further and separate answer and defense of the respondents to the third cause of action herein, admits, alleges and denies as follows, to-wit:

I.

It denies that the rate of \$4.00 per hundred pounds was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon.

II.

It denies that the said rate of \$4.00 per hundred pounds charged and paid by the said petitioner for the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon, was just or reasonable, but it alleges that the said rate was unjust and unreasonable to the amount and extent alleged in its petition herein.

The said petitioner for its reply to the amended answer of respondents herein, admits, alleges and denies as follows, to-wit:

I.

It denies that the rate of \$4.00 per hundred pounds was the lawful rate applicable to the transportation of motorcycles in carload lots from Armory, Massachusetts, to Portland, Oregon.

II.

It admits the allegations, matters and things contained in paragraph II of the amendment to the amended answer herein, except that the said petitioner denies that it added to the retail price of each motorcycle the sum of \$15.00, or that the said sum was assessed or added to cover, or that the same did cover, all freight charges under the said tariff complained of upon each motorcycle, but petitioner alleges the facts to be that it purchased all of the said motorcycles in the shipments mentioned in the petition herein from the factory at Armory, Mass., and in some instances, the number petitioner cannot state, the petitioner did not add \$15.00 to the retail price of the said motorcycles, but was compelled to sell, and did sell the same less the said \$15.00.

III.

Petitioner denies that by reason of the plan or method formed or adopted by petitioner in the transaction of its said business of the purchase, sale and distribution of said motorcycles, it has, by reason of said freight charges, been damaged in no sum whatever, but alleges the fact to be that it has been damaged to the amount and extent stated in its petition herein, and in addition thereto it has been damaged in a large sum of money by reason of the fact that owing to the said unreasonable freight charges made and collected by the said re-

spondents it, the said petitioner, was unable to make as many sales of said motorcycles as it could have made had the said freight charges been reasonable.

WHEREFORE, the said petitioner prays that it have judgment as demanded in its petition herein.

.....

Attorneys for Petitioner.

District of Oregon,

County of Multnomah—ss.

I, C. F. Wright, being first duly sworn, depose and say that I am vice-president of Ballou & Wright, petitioner in the above entitled cause; and that the foregoing reply is true as I verily believe.

C. F. WRIGHT.

Subscribed and sworn to before me this 14th day of February, 1916.

(Seal)

B. F. FINKE,

Notary Public for the State of Oregon.

My commission expires 12/24/16.

District of Oregon,

County of Multnomah—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this 14th day of February, 1916, by receiving a copy thereof, duly certified to as such by James E. Fenton, of Attorneys for Petitioner.

C. E. COCHRAN,

Of Attorneys for Respondents.

Filed February 17, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 21st day of February, 1916, there was duly filed in said Court and cause, Findings of Fact and Conclusions of Law, in words and figures as follows, to wit:

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Now at this time, February 21st, 1916, this cause coming on regularly for trial, the petitioner appearing by Will H. Bard and James E. Fenton, its attorneys, and the respondents appearing by C. E. Cochran and A. W. Hawkins, their attorneys, and the Court having heard the testimony offered at the trial of this cause, and having duly considered said testimony, and the admissions appearing in the pleadings herein, and the stipulations of counsel for petitioner and respondents, and now being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, to-wit:

FINDINGS OF FACT.

The Court finds:

I.

That the petitioner and respondents at the times alleged in the petition herein possessed and now possesses the corporate character as alleged in said petition.

II.

That J. M. Dickinson is now and was at all the times stated in the petition, the duly qualified and acting receiver of the respondent The Chicago, Rock Island & Pacific Railway Company, a corporation.

III.

That Armory, Massachusetts, the point of origin of the freight shipments hereinafter mentioned, is on the line of The New York, New Haven & Hartford Railroad Company, and Portland, Oregon, the destination of said shipments hereinafter mentioned, is on the line of the respondent, Oregon-Washington Railroad & Navigation Company, and that said shipments moved over the lines of railroad of the respondents, which constitute a through connecting rail route from Armory, Massachusetts, to Portland, Oregon.

IV.

That the petitioner is a wholesale and retail dealer in, distributor and seller and deliverer of motorcycles at Portland, Oregon, furnishing the same to a large and extensive trade within the State of Oregon and a portion of the States of Idaho and Washington.

V.

That each of the Respondents above named was at all the times herein mentioned and is now a common carrier engaged in interstate commerce by railroad, and in the transportation of passengers and property by railroad for hire, over its lines of railway, and as such common carrier each of said respondents was at all the times herein stated, and it is now, subject to the provisions of an Act of Congress of the United States, entitled An Act to Regulate Commerce, Approved February 4, 1887, and Acts amendatory thereof and supplementary thereto.

VI.

That between the dates of March 25, 1911, and January 24, 1913, petitioner shipped from Armory, Massachusetts, to Portland, Oregon, over the lines of railway of The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, five (5) carloads of motorcycles, weighing 79,000 pounds, and the said respondents charged and collected from petitioner and petitioner paid under protest as freight thereon, the total sum of \$3,160.00, based upon a commodity rate of \$4.00 per cwt. That the aggregate weight of the shipments made on March 25, 1911, and March 9, 1912, was 32,300 pounds, and when these shipments were made the first class rate then in effect if applied to motorcycles in carloads, from Armory, Mass., to Portland, Ore., was \$3.00 per cwt., which would amount to the total sum of \$969.00. That the aggregate weights of the shipments made July 3, 1912, August 22, 1912, and January 3, 1913, respectively, was 46,700 pounds and when these last named shipments were made, the first class rate then in effect if applied to motorcycles in carloads from Armory, Mass., to Portland, Ore., was \$3.70 per cwt., which amounts to the total sum of \$1727.90.

VII.

About February 3, 1914, the Interstate Commerce

Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its Order and Decision in said cause set out in the petition herein, and admitted in the answer herein, in which Order and Decision the said Interstate Commerce Commission among other things decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as aforesaid, was unreasonable to the extent that it exceeded the said first class rate in effect at the time said shipments of motor cycles were made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first class rate contemporaneously in effect.

VIII.

About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause wherein the petitioner herein was complainant and the respondents herein were defendants, made, rendered and entered of record its Order of Reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said Order of reparation the said Interstate Commerce Commission among other things ordered that said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central &

Hudson River Railroad Company, the Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said complainant in said cause, the petitioner herein, the sum of \$463.10, with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, as reparation on account of said unreasonable rate charged for the transportation of said motor cycles in carloads from Armory, Mass., to Portland, Oregon.

IX.

That said report and Order of reparation were served upon the said last named respondents and an immediate demand was made upon them that they comply with the said Order of reparation and pay unto the said petitioner the sum of \$463.10 with said interest thereon, as reparation, but the said respondents have, and each of them has failed, neglected and refused to comply with the said Order or to pay the said petitioner the said sum with said interest or any part thereof.

X.

The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipments, was and is unreasonable to the extent that it exceeded the first class rate in effect at the time the said shipments were made, from Armory, Mass., to Portland, Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount

so charged and collected on said shipments, and the amount petitioner would have paid at the said first class rate, contemporaneously in effect, to-wit: in the sum of \$463.10, with interest thereon at the rate of 6 per cent per annum from the 1st day of January, 1913.

XI.

That the sum of \$300.00 is a reasonable attorney's fee in this action to be taxed against the said respondents and collected as a part of the costs herein.

XII.

That there is now due and owing to said petitioner from the said respondents The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, the said sum of \$463.10, together with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, and the further sum of \$300.00, a reasonable attorney's fee herein.

XIII.

That between the first day of May, 1912, and the 20th day of May, 1912, petitioner shipped from Armory, Mass., to Portland, Ore., over the lines of railway of respondents, The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific

Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, one carload of motorcycles weighing 20,615 pounds, and said respondents charged and collected from petitioner and petitioner paid under protest as freight thereon, the total sum of \$824.60 based upon the commodity rate of \$4.00 per cwt. That at the time the said shipment was made the first class rate if applied to motorcycles in carloads from Armory, Mass., to Portland, Ore., was \$3.00 per cwt., which would amount to the total sum of \$618.45.

XIV.

About February 3, 1914, the Interstate Commerce Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its Order and Decision in said cause set out in the petition herein, and admitted in the answer herein, in which order and decision the said Interstate Commerce Commission among other things decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as aforesaid, was unreasonable to the extent that it exceeded the said first class rate in effect at the time said shipments of motorcycles were made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first class rate contemporaneously in effect.

XV.

About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause wherein the petitioner herein was complainant and the respondents herein were defendants, made, rendered and entered of record its Order of Reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said Order of Reparation the said Interstate Commerce Commission among other things ordered that said respondents The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said Complainant in said cause, the petitioner herein, the sum of \$206.15 with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, as reparation on account of said unreasonable rate charged for the transportation of said motorcycles in carloads from Armory, Mass., to Portland, Oregon.

XVI.

That said Report and Order of Reparation were served upon the said last named respondents and an immediate demand was made upon them that they comply with the said Order of Reparation and pay unto the said petitioner the sum of \$206.15 with said interest thereon, as reparation, but the said respondents have, and each of them has failed, neglected and refused to

comply with the said Order or to pay the said petitioner the said sum with said interest or any part thereof.

XVII.

The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipment, was and is unreasonable to the extent that it exceeded the first class rate in effect at the time the said shipment was made, from Armory, Mass., to Portland, Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount so charged and collected on said shipment, and the amount petitioner would have paid at the said first class rate, contemporaneously in effect, to-wit; in the sum of \$206.15, with interest thereon at the rate of 6 per cent per annum from the 1st day of January, 1913.

XVIII.

That the sum of \$100.00 is a reasonable attorney's fee in this action to be taxed against the said respondents and collected as a part of the costs herein.

XIX.

That there is now due and owing to said petitioner from said respondents, The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company and J. M. Dickinson, as receiver thereof, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, the said sum

of \$206.15, together with interest thereon at the rate of 6 per cent per annum from January 1, 1913, and the further sum of \$100.00 a reasonable attorney's fee herein.

XX.

That between the 19th day of April, 1912, and the 20th day of May, 1912, petitioner shipped from Armory, Mass., to Portland, Oregon, over the lines of the railway of respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company one carload of motorcycles weighing 15,888 pounds, and the said respondents charged and collected from petitioner and petitioner paid under protest, as freight thereon, the total sum of \$635.52, based upon a commodity rate of \$4.00 per cwt. That when the said shipment was made the first class rate then in effect if applied to motorcycles in carloads from Armory, Mass., to Portland, Ore., was \$3.00 per cwt., which would amount to the total sum of \$476.64.

XXI.

About February 3, 1914, the Interstate Commerce Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its order and decision in said cause, set out in the petition herein, and admitted in the answer herein, in which order and

decision the said Interstate Commerce Commission among other things decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as aforesaid, was unreasonable to the extent that it exceeded the said first class rate in effect at the time said shipment of motorcycles was made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first class rate contemporaneously in effect.

XXII.

About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause wherein the petitioner herein was complainant and the respondents herein were defendants, made, rendered and entered of record its Order of Reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said Order of reparation the said Interstate Commerce Commission among other things ordered that said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said complainant in said cause, the petitioner herein, the sum of \$158.88 with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, as reparation on account of said

unreasonable rate charged for the transportation of said motor cycles in carloads from Armory, Mass., to Portland, Ore.

XXIII.

That said report and order of reparation were served upon the said last named respondents and an immediate demand was made upon them that they comply with the said Order of Reparation and pay unto the said petitioner the sum of \$158.88 with said interest thereon, as reparation, but the said respondents have, and each of them has failed, neglected and refused to comply with the said Order or to pay the said petitioner the said sum with said interest or any part thereof.

XXIV.

The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipments, was and is unreasonable to the extent that it exceeded the first class rate in effect at the time the said shipment was made, from Armory, Mass., to Portland, Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount so charged and collected on said shipments, and the amount petitioner would have paid at the first class rate, contemporaneously in effect, to-wit: in the sum of \$158.88, with interest thereon at the rate of 6 per cent per annum from the first day of January, 1913.

XXV.

That the sum of \$100.00 is a reasonable attorney's fee in this action to be taxed against the said respondents and collected as a part of the costs herein.

XXVI.

That there is now due and owing to said petitioner from the said respondents The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, the said sum of \$158.88, together with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, and the further sum of \$100.00, a reasonable attorney's fee herein.

XXVII.

The Court finds that all of the allegations in the petition herein have been fully sustained and proved by competent evidence.

CONCLUSIONS OF LAW.

The Court finds:

I.

That the measure of damages to petitioner herein is the difference between the amount collected by the said respective respondents and paid by the said petitioner on the said respective shipments, and the amount the petitioner would have paid at the said first class rate in effect at the time the said respective shipments moved, to-wit: the said respective amounts hereinbefore stated, in the Findings of Fact herein.

II.

That the said petitioner is entitled to judgment against the said respondents the New York, New Haven

& Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, in the sum of \$463.10, together with interest thereon at the rate of 6 per cent per annum from the first day of January, 1913, and the further sum of \$300.00, a reasonable attorney's fee herein, and for its costs and disbursements herein.

III.

That the said petitioner is entitled to judgment against the said respondents The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company, and J. M. Dickinson, as receiver thereof, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company in the sum of \$206.15 together with interest thereon at the rate of 6 per cent per annum from the first day of January, 1913, and the further sum of \$100.00, a reasonable attorney's fee herein, and for its costs and disbursements herein.

IV.

That the said petitioner is entitled to judgment against the said respondents The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minne-

apolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, in the sum of \$158.88, together with interest thereon at the rate of 6 per cent per annum from the first day of January, 1913, and the further sum of \$100.00 as a reasonable attorney's fee herein, and for its costs and disbursements herein.

Let judgment be entered accordingly.

CHAS. E. WOLVERTON,

Judge.

Filed February 21, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Monday, the 21st day of February, 1916, the same being the 97th judicial day of the regular November, 1915, term of said Court; Present, the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

JUDGMENT.

Now at this time, February 21st, 1916, this cause coming on regularly for trial, the petitioner appearing by Will H. Bard and James E. Fenton, its attorneys, and the respondents appearing by C. E. Cochran and A. W. Hawkins, their attorneys, and the Court having heard the testimony offered at the trial of this cause, and having duly considered said testimony and the admissions appearing in the pleadings herein, and the stip-

ulation of counsel for petitioner and respondents, and having heretofore made, filed and entered its findings of fact and conclusions of law herein, and now being fully advised in the premises, and it appearing to the court that the said petitioner is entitled to a judgment against said respondents in accordance with said Findings of Fact and Conclusions of law herein.

Now, therefore, upon motion of James E. Fenton, of counsel for petitioner,

IT IS ORDERED AND ADJUDGED, that the said petitioner do have and recover, and it is hereby awarded judgment against the said respondents the New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company for the said sum of \$463.10, together with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, and the further sum of \$300.00, a reasonable attorney's fee herein, and the further sum of \$16.00, its costs and disbursements herein, to-wit: The total sum of \$866.31, and it is ORDERED execution may issue therefor.

AND IT IS FURTHER ORDERED AND ADJUDGED that said plaintiff do have and recover judgment, and it is hereby awarded judgment against the said respondents The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago &

Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company, and J. M. Dickinson as receiver thereof, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company for the said sum of \$206.15, together with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, and the further sum of \$100.00, a reasonable attorney's fee herein, and the further sum of \$16.00, its costs and disbursements herein, to-wit: The total sum of \$360.96, and it is ORDERED execution may issue therefor.

AND IT IS FURTHER ORDERED AND ADJUDGED that said petitioner do have and recover judgment, and it is hereby awarded judgment against the said respondents The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company for the said sum of \$158.88, together with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, and the further sum of \$100.00, a reasonable attorneys' fee herein, and the further sum of \$16.00, its costs and disbursements herein, to-wit: the total of sum of \$304.78, and it is ORDERED execution may issue therefor.

CHAS. E. WOLVERTON,
Judge.

Filed February 21, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 21st day of February, 1916, there was duly filed in said Court and cause, Findings of Fact and Conclusions of Law requested by the defendants and refused, in words and figures as follows, to wit:

**FINDINGS OF FACT AND CONCLUSIONS OF
LAW REQUESTED BY DEFENDANT
AND REFUSED.**

Coming on to be heard upon the testimony offered at the trial, the stipulations of counsel made and the admissions appearing in the pleadings, the Court in the above case makes the following

FINDINGS OF FACT.

I.

That the plaintiff and defendants possess corporate character as alleged in the complaint.

II.

That Armory, Massachusetts, the point of origin of the freight shipments hereinafter mentioned, is on the line of The New York, New Haven & Hartford Railroad Company, and Portland, Oregon, the destination of said shipments hereinafter mentioned, is on the line of the respondent, Oregon-Washington Railroad & Navigation Company, and that said shipments moved over the lines of railroad of the respondents, which constitute a through connecting rail route from Armory, Massachusetts to Portland, Oregon.

III.

That the petitioner is a wholesale and retail dealer in, distributor and seller and deliverer of motorcycles

at Portland, Oregon, furnishing the same to a large and extensive trade within the State of Oregon and a portion of the States of Idaho and Washington.

IV.

That between the dates of March 25, 1911 and January 1, 1913, the petitioner shipped from Armory, Massachusetts to Portland, Oregon, seven carloads of motorcycles weighing 115,503 pounds, and that the freight collected by the respondents was based upon a commodity rate of \$4.00 per hundred pounds, which the respondents had published and on file with the Commission, amounted to the sum of \$4,620.12.

V.

About February 3, 1914, the Interstate Commerce Commission, in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, held, based upon testimony, said commodity rate of \$4.00 per hundred pounds unreasonable to the extent that it exceeded the first class rate contemporaneously in effect at the time the shipments were made, and without further or any testimony bearing upon any question of damage in relation to the application of said rates, to the business of petitioner, found the petitioner was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first class rate contemporaneously in effect, and awarded reparation upon that basis.

VI.

The Court further finds that the difference between the rate charged petitioner by respondents and the rate fixed by the Commission in said proceedings as being

the reasonable rate applicable to and assessable against the transportation of motorcycles from Armory, Massachusetts, to Portland, Oregon, computed upon the number of pounds the shipments of motorcycles weighed that moved under said tariff and within said times in specie would be the sum of \$838.13, and that the only way said sums could have been arrived at by the Commission was by measuring the damage by taking the difference between the rate charged by the carrier and the rate fixed by the Commission as being reasonable.

VII.

The Court further finds that the petitioner in respect to motorcycles is a wholesale and retail dealer therein, having a contract with the manufacturer at Armory, Massachusetts, assuring to the petitioner the exclusive right to the sale and distribution of motorcycles in the State of Oregon and portions of the States of Idaho and Washington, and that the manufacturer fixed the retail price by means of public catalogues listing the same at which motorcycles were to be sold to the trade; that Ballou & Wright purchased said motorcycles f. o. b. Armory, Massachusetts, and caused the same to be shipped and delivered to them at Portland, Oregon, they paying the freight thereon; that Messrs. Ballou & Wright, petitioner herein, did sell each and all of said motorcycles to the trade within their exclusive district at said factory list price, together with the sum of Fifteen (\$15.00) Dollars additional on each and every motorcycle, which was for the purpose of and did cover the freight chargeable to each motorcycle and based upon said commodity rate of \$4.00 per hundred pounds, and at the time each transaction took place in the sale of

each motorcycle the purchaser was told in the regular course of the company's business that the said sum of \$15.00 was the freight on said motorcycles and that the purchaser was obtaining the same at the factory list price, plus the freight, and that each and all of said motorcycles were sold the same way; that the said sum of \$15.00 did in all cases, save and except to twenty-five motorcycles, cover said freight and leave a small profit besides.

VIII.

The Court further finds that all of the motorcycle dealers in the western states and western territory transacted their business of buying and selling motorcycles on the same plan adopted by the petitioner herein.

IX.

The Court further finds that in the transaction of the motorcycle business in the purchase and distribution of the same to the trade in the district for which Messrs. Ballou & Wright had the exclusive rights, that they received from the trade sufficient amounts of money to cover the freight as they paid to the respondents, and the profits of petitioner was not in any way affected by said rate complained of.

X.

The Court further finds that there is no evidence introduced respecting damages, such as loss of profits, expenses in meeting competition, loss of profits on sales in competitive territory, and under the contract giving Messrs. Ballou & Wright the exclusive agency for certain territory, that there was no competitive territory from which Messrs. Ballou & Wright were excluded.

XI.

That the amount of freight which Messrs. Ballou & Wright paid upon the entire shipments was the sum of \$4620.12; that the amount of money that would have been paid if the freight were assessed at the rate fixed by the Commission as being reasonable would have been the sum of \$3781.99, and that the excess charged above the Commission found reasonable rate was the sum of \$838.13.

From the foregoing Findings of Fact, the Court deduces the following

CONCLUSIONS OF LAW.

First: That the measure of damages in this case is not the difference between the rate charged by the respondents for the shipments complained of in the complaint and the sum which the petitioner would have paid had the rate been assessed in the amount fixed by the Interstate Commerce Commission as reasonable.

Second: That under the method pursued by the petitioner for the transaction of the business in relation to said motorcycles, the measure of the damage suffered by petitioners is the interest at the legal rate, which in this state is six per cent upon the sum of \$838.13, being the difference between the freight computed at the two rates from the time the same were paid to the carrier until the time the same was returned in the due course of business from the trade, but that there is no date or ultimate facts proved by said testimony upon the theory of the petitioner to which to apply said measure of damage.

Third: That the respondents should have judgment for their costs and disbursements of this action.

.....
Judge.

Filed February 21, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of April, 1916, there was duly filed in said Court and cause, a Bill of Exceptions, in words and figures as follows, to wit:

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on this the 16th day of February, 1916, at a regular term of the above entitled Court, held at the City of Portland, State of Oregon, the above entitled cause came on for trial before the Honorable Charles E. Wolverton, Judge presiding, when the following proceedings were had, to-wit:

A jury was waived by each of the respective parties. The petitioner applied to the Court for leave to amend its petition by inserting at the end of paragraph VII of its first cause of action the following words:

“That J. M. Dickinson is now, and was at all the times herein stated, the duly qualified and acting receiver of the said Chicago, Rock Island and Pacific Railway Company.”

And also to further amend the petition by adding and inserting in the original petition the same allegation at the end of paragraph I in petitioner's second cause

of action, and to further amend the same by adding and inserting the same allegation at the end of paragraph III in petitioner's third cause of action, and for leave of Court to sue the receiver. Leave was granted and the amendments were allowed by the Court.

The respondents applied to the Court for leave to file an amendment to the amended answer. There being no objection, the application was allowed and it was agreed that the amendment be filed with the Clerk and considered a part of the answer without the formality of re-writing the amended answer and including said amendment therein.

In addition to a consideration of the order of the Interstate Commerce Commission and the decision awarding reparation pleaded in the petition and admitted by the railroad companies to have been rendered, the petitioner offered the testimony of Mr. C. W. Fulton and Mr. Samuel White, attorneys of considerable and extended experience, whose testimony tended to show that a reasonable attorney's fee, in the event that petitioner should prevail, was the sum of Five Hundred (\$500.00) Dollars. The petitioner then rested its case.

The respondents offered the following testimony in support of the issues tendered by their answer:

W. J. FINKE, being called as a witness on behalf of the Respondents, testified as follows:

Name, W. J. Finke; Treasurer of Ballou & Wright; have been such since December, 1914; have been connected with Messrs. Ballou & Wright for seven years previously to February, 1916. Am familiar with the business in relation to certain shipments of motorcycles

from Armory, Massachusetts, to Portland, Oregon, between the dates of March 25, 1911, and January 1, 1913. Such shipments consisted of seven carloads.

The following question was asked the witness:

“Q. And what relationship did Messrs. Ballou & Wright have with the factory in respect to the distribution of these motorcycles?

A. Yes, we have a contract whereby we purchase motorcycles outright, and we have a stipulated territory.

Q. What is that territory?

A. It is all of Oregon and a part of Washington and a part of Idaho.

Q. State whether or not Messrs. Ballou & Wright are the exclusive agents or distributors for that territory, under your contract.

A. Yes, we are exclusive. Of course, we have our sub-agents, but they are under us.

Q. Very true, but they deal under you, or with you?

A. Yes, sir.

Q. What is the fact as to whether or not all of the shipments mentioned in the bill of complaint as having been transported by the defendants and received by Ballou & Wright at Portland were in turn and again sold by them to the trade within this district just mentioned?

A. You say, were they sold?

Q. Yes, sir.

A. Yes, we sold the machines.”

The following question was asked by the Court:

“COURT: I understand you purchased these machines of the company outright?

A. Yes, sir, straight purchase.

COURT: And you had them shipped here?

A. Yes, sir.

Q. Did you pay the freight on them?

A. We paid the freight up for the machines.

Q. And when they arrived here, did you sell them out to your various customers?

A. Yes, sir.

Q. Sell them on contract between yourself and the customers?

A. Not necessarily contract. It is often just straight sale, like any other merchandise."

(Questions by Mr. Cochran continued.)

Q. What do you mean by straight sale, like any other purchase?

A. Well, for instance, a purchaser for a motorcycle might come in our store, and take the machine and give us the cash, and the transaction is closed.

Q. I see. Just simply a cash sale?

A. Yes. Of course, other machines we might sell on time, we have a contract to protect us until we get all our money, a conditional sales contract.

Q. So that in the transactions of the disposition of these machines, they are either sold for cash outright, or upon such terms as you and the party may agree upon, under what is called a conditional sales contract, title to remain in your company until paid for?

A. Yes, sir.

Q. In consideration of the sales for the motorcycles mentioned in the bill of complaint as having come from Armory, Massachusetts, did you buy them F. O. B. factory at Armory, Mass., or at Portland, Oregon?

A. F. O. B. factory at Armory, Massachusetts.

Q. Does the factory give you a list price at which you are to sell the motorcycles to the trade?

A. They did at that time. That is, I want to be understood correctly on that—they put out a Pacific Coast catalogue, and we sold at that catalogue price.

MR. FENTON: I didn't understand that answer.

A. During 1911 and 1912, during that time the factory gave us a price at which we were to sell the machines, a catalogue price, and they furnished us with catalogues, and also sent us large quantities that we could distribute; and the prices are printed in those catalogues, and we sold at those prices.

COURT: That is to say, they fixed the price at which you could sell?

A. Yes, sir.

COURT: And you sold according to those prices?

A. Yes, sir.

MR. COCHRAN continuing: Now, your profit, the profit of Messrs. Ballou & Wright, was a commission on that list price, was it not?

COURT: I understood you to say you bought outright?

A. We did. And of course the difference between what our cost was and the catalogue price was our profit.

MR. COCHRAN continuing: Q. What I am getting at is this: The contract—I don't think I care to have you produce it; I think the point can be made just as well without it—did this contract fix a price at which each machine of the particular type purchased came to

you, or did it give you a percentage off the list price as your profit?

A. Yes, it gave us a jobbers' discount that we were entitled to from the factory list price; jobbers' discount.

Q. That jobbers' discount represented your profit?

A. No, because we in turn—it did not always represent our profit, because we, of course, would sell these machines to our agents at another discount.

MR. FENTON: Not at a discount?

A. From the list.

(Mr. Cochran continuing): Q. Another trade discount, you mean?

A. Yes, another trade discount from the list.

Q. The gross price, then, including the discounts from the factory at Armory, Massachusetts, to Ballou & Wright, was always this list price published in catalogues which were available for public distribution?

A. Yes, sir.

Q. Now, when you sold a motorcycle, and all of them in turn, did you sell with reference to this catalogue list price

A. Yes, sir.

Q. What sums did you add to that price?

Mr. FENTON: Objected to upon the ground it is incompetent, irrelevant and immaterial, not bearing upon any issue involved in the case, incompetent on the question of the measure of damages, for the reason that the respondents are estopped from claiming any reduction of damages on account of any addition to the cost price.

COURT: You intend to show thereby that they added the freight to the catalogue price?

MR. COCHRAN: Yes.

The objection was sustained by the Court and an exception allowed, whereupon Mr. Cochran made the following offer:

MR. COCHRAN: I desire to prove by the witness, if allowed to answer this particular question, that he would say that, as to all the machines shipped and covered by the facts set forth in the complaint, amounting to substantially 1200 machines, they were all sold for a price \$15.00 in excess of the list price, save and except as to about 25 machines, and that that \$15.00 was added for the purpose of covering the freight as assessed by the railroad company, being the rate complained of before the Interstate Commerce Commission.

COURT: Do you wish to show further that all these machines that they carried were sold?

MR. COCHRAN: Yes.

MR. FENTON: It is admitted that all the machines were sold.

COURT: The court will sustain the objection. The offer was therefore denied and an exception duly allowed.

Q. Isn't it a fact, in selling each and every of these machines, except the 25, that each customer was told that the \$15.00 in excess of the catalogue list price was for the purpose of covering the freight?

MR. FENTON: Objected to on the same ground as the previous question.

COURT: I will sustain that objection also, and you may have your exception. You may state your offer.

MR. COCHRAN: We offer to show, if the witness is allowed to answer the question, that each customer to

whom the \$15.00 in excess of list price was charged, was told in the regular course of the trade and of the business, that that charge was for the purpose of covering the freight; and that it did cover the freight, leaving a little besides—not a very extravagant amount, but just a little bit more.

The offer was denied, to which ruling of the Court counsel for the respondent excepted and their exception was duly allowed.

Q. Mr. Finke, isn't it a fact that all of the motorcycle dealers in the western territory, western part of the United States, during the times complained of in this case, followed the same practice and custom that Messrs. Ballou & Wright have followed, in relation to buying the motorcycles F. O. B. factory, paying the freight, adding the freight to the price of the machine to the trade, and recouping themselves in that way?

MR. FENTON: Objected to on the same ground as the previous question, and upon the additional ground that what other dealers may have done is wholly immaterial to this case.

The objection was sustained by the Court, to which ruling of the Court counsel for the respondents excepted and their exception was duly allowed, whereupon Mr. Cochran made the following offer:

MR. COCHRAN: We offer to show that the practice and custom of adding the freight to the price of the motorcycle to the trade was of general application, and was indulged in by all of the standard motorcycle dealers in the West.

The offer was denied, to which ruling of the Court counsel for respondents excepted, and their exception was duly allowed.

It further appeared by the testimony that the motorcycles were purchased from the Hendee Manufacturing Company of Armory, Massachusetts.

STIPULATION.

It was stipulated and agreed between counsel for petitioner and respondents that all those respondents who have not actually filed an answer may be deemed to have joined in the answer as filed, and that such answer be deemed and taken to be the answer of all the respondents, and applicable to their rights in the case.

It was further stipulated between counsel for petitioner and respondents that paragraphs 6, 7, 8 and 9 of the petition are admitted; paragraph 10 of the petition is admitted, except as to the reasonableness of the respondent's rates; paragraph 11 is admitted except as to the respondents' rates being unjust, excessive and unreasonable; paragraph 12 is admitted, except as to the unreasonableness of the respondents' rates and as to the claim of damage.

Paragraph 13 is admitted.

Paragraph 14 is denied.

Paragraphs 15 and 15a and 16 are admitted and the corresponding allegations so named in the second and third causes of action are also admitted.

The substance of which stipulation was that the question of the reasonableness or unreasonableness of respondents' rates and the quantum and measure of the damages, if any, petitioner suffered are proper issues to be determined from the record by the Court.

The respondents offered in evidence the petition of Messrs. Ballou & Wright to the Interstate Commerce

Commission, being the petition upon which the order set forth in the complaint was based; the answers of the respondents, and a copy of the testimony that was taken before the Interstate Commerce Commission; upon which record, including the pleadings and testimony, the order and findings of fact and decision and order of reparation of the Commission were based.

This offer was objected to by petitioner on the ground that it is incompetent, irrelevant and immaterial to any issue involved in the case.

MR. COCHRAN: I offer this record for the purpose of enabling the Court to review the action of the Interstate Commerce Commission in respect to the legal conclusions deducible therefrom. The Supreme Court of the United States has held that the decision of the Commission having been given by statute *prima facie* evidentiary effect, precludes the Court from reviewing any question of fact; but it does not prevent the Court from drawing a different conclusion of law, and it is for the purpose of availing ourselves of the right to ask for such different conclusions of law that this evidence is offered.

COURT: I will admit it for that purpose.

The said documents were admitted and are hereto physically attached, marked "Respondents' Exhibit 1" and made a part of this Bill of Exceptions.

Thereupon, respondents rested their case.

After argument of counsel, the Court directed petitioner's counsel to prepare findings of fact in petitioner's favor, to which ruling of the Court counsel for respondents excepted, and their exception was duly allowed; whereupon, the petitioner presented findings of fact as follows:

"Now at this time, February, 1916, this cause coming on regularly for trial, the petitioner appearing by Will H. Bard and James E. Fenton, its attorneys, and the respondents appearing by C. E. Cochran and A. W. Hawkins, their attorneys, and the Court having heard the testimony offered at the trial of this cause, and having duly considered said testimony, and the admissions appearing in the pleadings herein, and the stipulations of counsel for petitioner and respondents, and now being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, to-wit:

FINDINGS OF FACT.

The Court finds:

I.

That the petitioner and respondents at the times alleged in the petition herein possessed and now possesses the corporate character as alleged in said petition.

II.

That J. M. Dickinson is now and was at all the times stated in the petition, the duly qualified and acting receiver of the respondent The Chicago, Rock Island & Pacific Railway Company, a corporation.

III.

That Armory, Massachusetts, the point of origin of the freight shipments hereinafter mentioned, is on the line of The New York, New Haven & Hartford Railroad Company, and Portland, Oregon, the destination of said shipments hereinafter mentioned, is on the line of the respondent, Oregon-Washington Railroad & Nav-

igation Company, and that said shipments moved over the lines of railroad of the respondents, which constitute a through connecting rail route from Armory, Massachusetts to Portland, Oregon.

IV.

That the petitioner is a wholesale and retail dealer in, distributor and seller and deliverer of motorcycles at Portland, Oregon, furnishing the same to a large and extensive trade within the State of Oregon and a portion of the States of Idaho and Washington.

V.

That each of the respondents above named was at all the times herein mentioned and is now a common carrier engaged in interstate commerce by railroad, and in the transportation of passengers and property by railroad for hire, over its lines of railway, and as such common carrier each of said respondents was at all the times herein stated, and it is now, subject to the provisions of an Act of Congress of the United States, entitled—An Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof and supplementary thereto.

VI.

That between the dates of March 25, 1911 and January 24, 1913, petitioner shipped from Armory, Mass., to Portland, Oregon, over the lines of railway of The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad

Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, five (5) carloads of motorcycles, weighting 79,000 pounds, and the said respondents charged and collected from petitioner and petitioner paid under protest as freight thereon, the total sum of \$3,160.00, based upon a commodity rate of \$4.00 per cwt. That the aggregate weight of the shipments made on March 25, 1911 and March 9, 1912 was 32,300 pounds, and when these shipments were made the first class rate then in effect if applied to motorcycles in carloads, from Armory, Mass., to Portland, Ore., was \$3.00 per cwt., which would amount to the total sum of \$969.00. That the aggregate weights of the shipments made July 3, 1912, August 22, 1912 and January 3, 1913, respectively, was 46,700 pounds and when these last named shipments were made, the first class rate then in effect if applied to motorcycles in carloads from Armory, Mass., to Portland, Ore., was \$3.70 per cwt. which amounts to the total sum of \$1727.90.

MR. COCHRAN: I desire to object to finding No. 6 just read, and to except to its being placed in the findings adopted, and particularly to that part citing that on the shipment the payment of freight on basis of \$4.00 per hundred-weight was paid under protest; and secondly, that the words, 'And when these shipments were made the first class rate then in effect if applied to motorcycles in carloads from Armory, Mass., to Portland, Oregon, was \$3.00 per cwt., which would amount to the total sum of \$969.00,' and also to the same words appearing in the latter part of the finding, wherein it is recited that 'The first class rate then in effect if applied

to motorcycles in carloads from Armory, Mass., to Portland, Oregon, was \$3.70 per cwt., which amounts to the total sum of \$1727.90,' for the reason that the evidence does not support a finding that such first class rates applied to motorcycles.

VII.

About February 3, 1914, the Interstate Commerce Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its Order and Decision in said cause set out in the petition herein, and admitted in the answer herein, in which Order and Decision the said Interstate Commerce Commission among other things decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as aforesaid, was unreasonable to the extent that it exceeded the said first class rate in effect at the time said shipments of motorcycles were made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first class rate contemporaneously in effect.

MR. COCHRAN: We desire to object to finding No. VII, as to the substance of it, as being immaterial, and particularly the last part, setting forth the findings of the Interstate Commerce Commission as to the measure of the damage, upon the ground that such is not the proper measure of damage under the facts and circumstances shown and offered to be shown by the testimony.

The objection was overruled, to which ruling of the Court counsel for the respondents excepted, and their exception was duly allowed.

VIII.

About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause wherein the petitioner herein was complainant and the respondents herein were defendants, made, rendered and entered of record its Order of Reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said Order of Reparation the said Interstate Commerce Commission among other things ordered that said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said complainant in said cause, the petitioner herein, the sum of \$463.10, with interest thereon at the rate of 6 per cent per annum from January 1, 1913, as reparation on account of said unreasonable rate charged for the transportation of said motorcycles in carloads from Armory, Mass., to Portland, Oregon.

MR. COCHRAN: I desire to object to finding No. 8 as it is immaterial, insofar as it is inconsistent with the theory of the respondents, and as more particularly set forth in their requests for findings.

IX.

That said report and Order of Reparation were served upon the said last named respondents and an immediate demand was made upon them that they comply with the said order of reparation and pay unto the said petitioner the sum of \$463.10, with said interest thereon, as reparation, but the said respondents have, and each of them has failed, neglected and refused to comply with the said order or to pay the said petitioner the said sum with said interest or any part thereof.

X.

The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipments, was and is unreasonable to the extent that it exceeded the first class rate in effect at the time the said shipments were made, from Armory, Mass., to Portland, Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount so charged and collected on said shipments, and the amount petitioner would have paid at the said first class rate, contemporaneously in effect, to-wit: in the sum of \$463.10, with interest thereon at the rate of 6 per cent per annum from the 1st day of January, 1913.

MR. COCHRAN: I desire to object to finding No. X:

First, to the part finding that the rate was unreasonable to the extent that it exceeded the first class rate in effect at the time the shipments were made, from Armory, Mass., to Portland, Oregon, for that such finding is not a proper conclusion of fact from the testimony.

Secondly, we object to that part referring to the measure of the damage as being in an amount equal to the difference between the amount of freight charged and collected and the amount the petitioner would have paid had they paid at the rate fixed by the Interstate Commerce Commission, for that such is not the proper measure of the damage in cases of this kind, and particularly under the conditions and circumstances shown by the testimony in which Messrs. Ballou & Wright transacted their business.

The objection was overruled, to which ruling of the Court counsel for the respondents excepted and the exception was duly allowed.

XI.

That the sum of \$300.00 is a reasonable attorneys' fee in this action to be taxed against the said respondents and collected as a part of the costs herein.

MR. COCHRAN: We have no objection to the conclusion of fact thus formulated, except that we object to any conclusion of fact in favor of the plaintiff, including this, on the ground and for the reasons stated; that under the pleadings and case as made, the petitioner is not entitled to prevail. The objection was overruled and an exception duly allowed.

XII.

That there is now due and owing to said petitioner from the said respondents The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company,

Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, the said sum of \$463.10, together with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, and the further sum of \$300.00, a reasonable attorney's fee herein.

MR. COCHRAN: That finding is objected to, because under the testimony the petitioner is not entitled to prevail. The objection was overruled and an exception allowed.

XIII.

That between the first day of May, 1912 and the 20th day of May, 1912, petitioner shipped from Armory, Mass., to Portland, Oregon, over the lines of railway of respondents, The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, one carload of motorcycles weighing 20,615 pounds, and said respondents charged and collected from petitioner and petitioner paid under protest as freight thereon, the total sum of \$824.60, based upon the commodity rate of \$4.00 per cwt. That at the time the said shipment was made the first class rate if applied to motorcycles in carloads from Armory, Mass., to Portland, Oregon, was \$3.00 per cwt., which would amount to the total sum of \$618.45.

XIV.

About February 3, 1914, the Interstate Commerce Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its Order and Decision in said cause set out in the petition herein, and admitted in the answer herein, in which Order and Decision the said Interstate Commerce Commission, among other things, decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as aforesaid, was unreasonable to the extent that it exceeded the said first class rate in effect at the time said shipments of motorcycles were made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first class rate contemporaneously in effect.

MR. COCHRAN: I desire to object to finding No. XIV, and particularly to the part reading as follows: 'And that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first class rate contemporaneously in effect.'

It is true, however, that the Interstate Commerce Commission did make such finding; but as evidence in

the case, and as a particular measure of damage, we object to it, assigning as a reason that it is not, under the conditions and circumstances under which plaintiff transacted its business, a proper measure of damage.

COURT: The objection is overruled and an exception is duly allowed.

XV.

About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause wherein the petitioner herein was complainant and the respondents herein were defendants, made, rendered and entered of record its Order of Reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said Order of Reparation the said Interstate Commerce Commission, among other things, ordered that said respondents, The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said complainant in said cause, the petitioner herein, the sum of \$206.15, with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, as reparation on account of said unreasonable rate charged for the transportation of said motorcycles in carloads from Armory, Mass., to Portland, Oregon.

MR. COCHRAN: We object to finding No. 15, because it is not a conclusion of fact based upon the proper measure of damage in such case.

The objection is overruled and an exception is allowed.

XVI.

That said report and order of reparation were served upon the said last named respondents and an immediate demand was made upon them that they comply with the said order of reparation and pay unto the said petitioner the sum of \$206.15, with said interest thereon as reparation, but the said respondents have, and each of them has failed, neglected and refused to comply with the said order or to pay the said petitioner the said sum with said interest or any part thereof.

XVII.

The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipment, was and is unreasonable to the extent that it exceeded the first class rate in effect at the time the said shipment was made, from Armory, Mass., to Portland, Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount so charged and collected on said shipment, and the amount petitioner would have paid at the said first class rate, contemporaneously in effect, to-wit: in the sum of \$206.15, with interest thereon at the rate of 6 per cent per annum from the 1st day of January, 1913.

MR. COCHRAN: I desire to object to Finding No. 17 on the ground, first, that a finding that the rate was unreasonable to the extent it exceeded the first class rate is unsupported by the testimony, or by any proper conclusion of fact deducible therefrom; and to object to

the second portion of the finding, that part referring to the measure of the damage and reading as follows: 'That petitioner was and is damaged in an amount equal to the difference between the said amount so charged and collected on said shipment, and the amount petitioner would have paid at the said first class rate, contemporaneously in effect,' for the reason that, in this case and in cases of like type, such is not the proper measure of damage, particularly in view of the facts and circumstances shown in evidence as to the manner in which plaintiff transacted its business, on account of having added the freight to the selling price; in each and every instance of the sale of motorcycles, with the exception of 25, the purchaser paid such freight, and fully and entirely compensated the plaintiff for any damage or loss arising out of the transaction of securing the motorcycles from the manufacturer and passing them on in course of business to the consumer.

The objection is overruled, to which ruling of the Court counsel for respondent excepted and their exception was duly allowed.

XVIII.

That the sum of \$100.00 is a reasonable attorney's fee in this action to be taxed against the said respondents and collected as a part of the costs herein.

We object to this finding because under the case as made, the petitioner is not entitled to prevail. The objection is overruled and an exception allowed.

XIX.

That there is now due and owing to said petitioner from said respondents, The New York, New Haven &

Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company and J. M. Dickinson, as receiver thereof, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, the said sum of \$206.15, together with interest thereon at the rate of 6 per cent per annum from January 1, 1913, and the further sum of \$100.00, a reasonable attorney's fee herein.

MR. COCHRAN: We object to that generally, upon the ground that it is not supported by the testimony.

The objection is overruled and an exception allowed.

XX.

That between the 19th day of April, 1912, and the 20th day of May, 1912, petitioner shipped from Armory, Mass., to Portland, Oregon, over the lines of railway of respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company one carload of motorcycles weighing 15,888 pounds, and the said respondents charged and collected from petitioner and petitioner paid under protest, as freight thereon, the total sum of \$635.52, based upon a commodity rate of \$4.00 per cwt. That when the said shipment was made the first class rate then in effect if applied to motor-

cycles in carloads from Armory, Mass., to Portland, Oregon, was \$3.00 per cwt. which would amount to the total sum of \$476.64.

XXI.

About February 3, 1914, the Interstate Commerce Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendant, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its order and decision in said cause, set out in the petition herein, and admitted in the answer herein, in which order and decision the said Interstate Commerce Commission, among other things, decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as aforesaid, was unreasonable to the extent that it exceeded the said first class rate in effect at the time said shipment of motorcycles was made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first class rate contemporaneously in effect.

MR. COCHRAN: We object to the finding as immaterial, and as not a proper conclusion of fact to be drawn from the evidence, in that it seems to find a damage based on an erroneous measure of damage.

The objection was overruled and an exception duly allowed.

XXII.

About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause wherein the petitioner herein was complainant and the respondents herein were defendants, made, rendered and entered of record its order of reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said order of reparation the said Interstate Commerce Commission, among other things, ordered that said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said complainant in said cause, the petitioner herein, the sum of \$158.88, with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, as reparation on account of said unreasonable rate charged for the transportation of said motorcycles in carloads from Armory, Mass., to Portland, Oregon.

MR. COCHRAN: We object to that finding upon the same grounds as heretofore stated to the same finding of fact as to the first and second causes of action, and particularly the erroneous measure of damage adopted by which to arrive at the amount of reparation. The objection was overruled and an exception duly allowed.

XXIII.

That said report and order of reparation were served upon the said last named respondents and an immediate

demand was made upon them that they comply with the said order of reparation and pay unto the said petitioner the sum of \$158.88, with said interest thereon, as reparation, but the said respondents have, and each of them has failed, neglected and refused to comply with the said order or to pay the said petitioner the said sum with said interest or any part thereof.

XXIV.

The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipments, was and is unreasonable to the extent that it exceeded the first class rate in effect at the time the said shipment was made, from Armory, Mass., to Portland, Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount so charged and collected on said shipments, and the amount petitioner would have paid at the first class rate, contemporaneously in effect, to-wit: in the sum of \$158.88, with interest thereon at the rate of 6 per cent per annum from the first day of January, 1913.

MR. COCHRAN: We object to this finding on the ground that it is an improper conclusion of fact from the evidence, in that it proceeds upon an erroneous measure of damage in cases of this kind, and under the conditions and circumstances by which the plaintiff transacted its business in respect to the sale and distribution of motoreycles. The objection was overruled and an exception duly allowed.

XXV.

That the sum of \$100.00 is a reasonable attorney's fee in this action to be taxed against the said respondents and collected as a part of the costs herein.

MR. COCHRAN: Objected to by respondents because under the case as made the plaintiff is not entitled to prevail, and such finding would, therefore, be immaterial. The objection was overruled and an exception duly allowed.

XXVI.

That there is now due and owing to said petitioner from the said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, the said sum of \$158.88, together with interest thereon at the rate of 6 per cent per annum from January 1st, 1913, and the further sum of \$100.00 a reasonable attorney's fee herein.

MR. COCHRAN: This finding is objected to because plaintiff is not entitled to prevail under the evidence, the finding is therefore immaterial. The objection was overruled and an exception duly allowed.

XXVII.

The Court finds that all of the allegations in the petition herein have been fully sustained and proved by competent evidence.

MR. COCHRAN: We object to finding 27 generally upon the ground that the allegations of the petition

have not, in a substantial way, been supported by the evidence.

The objection was overruled and an exception duly allowed.

CONCLUSIONS OF LAW.

The Court finds:

I.

That the measure of damages to petitioner herein is the difference between the amount collected by the said respective respondents and paid by the said petitioner on the said respective shipments, and the amount the petitioner would have paid at the said first class rate in effect at the time the said respective shipments moved, to-wit: the said respective amounts hereinbefore stated, in the findings of fact herein.

MR. COCHRAN: We desire to object to Conclusion of Law No. 1, and to request the Court to find in lieu thereof the following:

That the measure of damages in this case is not the difference between the rate charged by the respondents for the shipments complained of in the complaint and the sum which the petitioner would have paid had the rate been assessed in the amount fixed by the Interstate Commerce Commission as reasonable.

And upon the further ground that the finding as requested by plaintiff does not state a proper conclusion of law as to the measure of damage.

The objection was overruled and an exception allowed respondents.

II.

That the said petitioner is entitled to judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, in the sum of \$463.10, together with interest thereon at the rate of 6 per cent per annum from the first day of January, 1913, and the further sum of \$300.00, a reasonable attorney's fee herein, and for its costs and disbursements herein.

MR. COCHRAN: We object to that finding because it is not a proper conclusion of law deducible from the testimony or from any proper finding of fact based thereon. The objection is overruled and an exception duly allowed.

III.

That the said petitioner is entitled to judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company, and J. M. Dickinson as receiver thereof, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company in the sum of \$206.15 together with interest thereon at the

rate of 6 per cent per annum from the first day of January, 1913, and the further sum of \$100.00, a reasonable attorney's fee herein, and for its costs and disbursements herein.

MR. COCHRAN: We object to that conclusion for the reasons stated in support of our objection to conclusion No. 2.

The objection is overruled, and an exception duly allowed.

IV.

That the said petitioner is entitled to judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, in the sum of \$158.88, together with interest thereon at the rate of 6 per cent per annum from the first day of January, 1913, and the further sum of \$100.00 as a reasonable attorney's fee herein, and for its costs and disbursements herein.

MR. COCHRAN: We object to Conclusion No. IV, for the reasons assigned in support of our objection to conclusion of law No. 11.

Thereupon, the respondents requested the Court to make and adopt Findings of Fact and Conclusions of Law, as follows:

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW REQUESTED BY DEFEND-
ANTS AND RESPONDENTS.**

Coming on to be heard upon the testimony offered at the trial, the stipulations of counsel made and the admissions appearing in the pleadings, the Court in the above case makes the following

FINDINGS OF FACT.

I.

That the plaintiff and defendants possess a corporate character as alleged in the complaint.

II.

That Armory, Massachusetts, the point of origin of the freight shipments hereinafter mentioned, is on the line of The New York, New Haven & Hartford Railroad Company, and Portland, Oregon, the destination of said shipments hereinafter mentioned, is on the line of the respondent, Oregon-Washington Railroad & Navigation Company, and that said shipments moved over the lines of railroad of the respondents, which constitute a through connecting rail route from Armory, Massachusetts to Portland, Oregon.

III.

That the petitioner is a wholesale and retail dealer in, distributor and seller and deliverer of motorcycles

at Portland, Oregon, furnishing the same to a large and extensive trade within the state of Oregon and a portion of the states of Idaho and Washington.

IV.

That between the dates of March 25, 1911, and January 1, 1913, the petitioner shipped from Armory, Massachusetts, to Portland, Oregon, seven carloads of motorcycles weighing 115,503 pounds, and that the freight collected by the respondents was based upon a commodity rate of \$4.00 per hundred pounds, which the respondents had published and on file with the commission, amounted to the sum of \$4,620.12.

To the refusal of the Court to find as a fact the foregoing, the respondent excepted and its exception was duly allowed.

V.

About February 3, 1914, the Interstate Commerce Commission, in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, held, based upon testimony, said commodity rate of \$4.00 per hundred pounds unreasonable to the extent that it exceeded the first class rate contemporaneously in effect at the time the shipments were made, and without further or any testimony bearing upon any question of damage in relation to the application of said rates, to the business of petitioner, found the petitioner was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first class rate contemporaneously in effect, and awarded reparation upon that basis.

VI.

The Court further finds that the difference between the rate charged petitioner by respondents and the rate fixed by the Commission in said proceedings as being the reasonable rate applicable to and assessable against the transportation of motorcycles from Armory, Massachusetts, to Portland, Oregon, computed upon the number of pounds the shipments of motorcycles weighed that moved under said tariff and within said times in specie would be the sum of \$838.13, and that the only way said sums could have been arrived at by the Commission was by measuring the damage by taking the difference between the rate charged by the carrier and the rate fixed by the Commission as being reasonable.

To the refusal of the Court to adopt the foregoing finding the respondent excepted and its exception was duly allowed.

VII.

The Court further finds that the petitioner in respect to motorcycles is a wholesale and retail dealer therein, having a contract with the manufacturer at Armory, Massachusetts, assuring to the petitioner the exclusive right to the sale and distribution of motorcycles in the state of Oregon and portions of the states of Idaho and Washington, and that the manufacturer fixed the retail price by means of public catalogues listing the same at which motorcycles were to be sold to the trade; that Ballou & Wright purchased said motorcycles f. o. b. Armory, Massachusetts, and caused the same to be shipped and delivered to them at Portland, Oregon, they paying the freight thereon; that Messrs.

Ballou & Wright, petitioner herein, did sell each and all of said motorcycles to the trade within their exclusive district at said factory list price, together with the sum of Fifteen (15.00) Dollars additional on each and every motorcycle, which was for the purpose of and did cover the freight chargeable to each motorcycle and based upon said commodity rate of \$4.00 per hundred pounds, and at the time each transaction took place in the sale of each motorcycle the purchaser was told in the regular course of the company's business that the said sum of \$15.00 was the freight on said motorcycles and that the purchaser was obtaining the same at the factory list price, plus the freight, and that each and all of said motorcycles were sold the same way; that the said sum of \$15.00 did in all cases, save and except the twenty-five motorcycles, cover said freight and leave a small profit besides.

To the refusal of the Court to adopt the foregoing finding, the respondent excepted and its exception was duly allowed.

VIII.

The Court further finds that all of the motorcycle dealers in the western states and western territory transacted their business of buying and selling motorcycles on the same plan adopted by the petitioner herein.

To the refusal of the Court to adopt the foregoing finding, the respondent excepts and its exception is duly allowed.

IX.

The Court further finds that in the transaction of the motorcycle business in the purchase and distribution

of the same to the trade in the district for which Messrs. Ballou & Wright had the exclusive rights, that they received from the trade sufficient amounts of money to cover the freight as they paid to the respondents, and the profits of petitioner was not in any way affected by said rate complained of.

To the refusal of the Court to adopt the foregoing Finding, the respondent excepted and its exception was duly allowed.

X.

The Court further finds that there is no evidence introduced respecting damages, such as loss of profits, expenses in meeting competition, loss of profits on sales in competitive territory, and under the contract giving Messrs. Ballou & Wright the exclusive agency for certain territory, that there was no competitive territory from which Messrs. Ballou & Wright were excluded.

To the refusal of the Court to adopt the foregoing Finding, the respondent excepted and its exception was duly allowed.

XI.

That the amount of freight which Messrs. Ballou & Wright paid upon the entire shipments was the sum of \$4620.12; that the amount of money that would have been paid if the freight were assessed at the rate fixed by the Commission as being reasonable would have been the sum of \$3781.99, and that the excess charged above the Commission found reasonable rate was the sum of \$838.13.

To the refusal of the Court to adopt the foregoing finding, the respondent excepted and its exception was duly allowed.

From the foregoing Findings of Fact, the Court deduces the following

CONCLUSIONS OF LAW:

First: That the measures of damages in this case is not the difference between the rate charged by the respondents for the shipments complained of in the complaint and the sum which the petitioner would have paid had the rate been assessed in the amount fixed by the Interstate Commerce Commission as reasonable.

To the refusal of the Court to adopt the foregoing Conclusion of Law, the respondents excepted and its exception was duly allowed.

Second: That under the method pursued by the petitioner for the transaction of the business in relation to said motorcycles, the measure of the damage suffered by petitioners is the interest at the legal rate, which in this state is six per cent upon the sum of \$838.13, being the difference between the freight computed at the two rates from the time the same were paid to the carrier until the time the same was returned in the due course of business from the trade, but that there is no date or ultimate facts proved by said testimony upon the theory of the petitioner to which to apply said measure of damage.

To the refusal of the Court to adopt the foregoing Conclusion of Law, the respondent excepted and its exception was duly allowed.

Third: That the respondents should have judgment for their costs and disbursements of this action.

To the refusal of the Court to adopt the foregoing Conclusion of Law, the respondent excepted and its exception was duly allowed.

Thereupon, the Court adopted and signed the Findings of Fact and Conclusions of law presented by the petitioner, and declined to sign and adopt the Findings of Fact and Conclusions of Law presented by the respondents, to which action of the Court respondents excepted and their exception was duly allowed.

Based upon the Findings of Fact and Conclusions of Law adopted by the Court a judgment was entered against the respondents, The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, for the sum of \$463.10, together with interest thereon at the rate of six per cent (6%) per annum from January 1, 1913, and the further sum of \$300.00 as a reasonable attorney's fee, and the further sum of \$16.00 costs and disbursements, aggregating \$866.31.

A further judgment was entered in favor of the petitioner and against the respondents, The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company and J. M. Dickinson as receiver thereof, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company for the sum of \$206.15, together with interest thereon

at the rate of 6 per cent per annum from January 1, 1913, and the further sum of \$100.00 as a reasonable attorney's fee and the further sum of \$16.00 costs and disbursements herein, aggregating the sum of \$360.96.

A further judgment was entered in favor of petitioner and against the respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company for the sum of \$158.88, together with interest thereon at the rate of 6 per cent per annum from January 1, 1913, and the further sum of \$100.00 as reasonable attorney's fees and the further sum of \$16.00 as costs and disbursements, aggregating the sum of \$304.78.

And now because the foregoing matters and things are not of record in this cause, I, Chas. E. Wolverton, District Judge and the Judge trying the above entitled action in the District Court of the United States for District of Oregon, hereby certify that the foregoing Bill of Exceptions truly states the proceedings had before me on the trial of the above entitled action, and contains all the evidence, both oral and written, introduced by either of the said parties throughout said trial, and the Findings of Fact and Conclusions of Law presented by the respondents and refusals by the Court, and the Findings of Fact and Conclusions of Law presented by the petitioner and adopted by the Court, and the respondents' exceptions thereto, and that the exceptions taken by the respondents therein were duly taken and

allowed, and that said Bill of Exceptions was duly prepared and submitted within the time allowed by the rules of the Court, as extended by the special order of this Court. Said Bill of Exceptions is here now signed, settled as and for the Bill of Exceptions in the above entitled action, and the same is ordered to be made a part of the record thereof.

CHAS. E. WOLVERTON,
Judge.

Our No. 373.

Before the Interstate Commerce Commission.

Interstate Commerce Attorney	}	Docket No. 5616
Mar. 24, 1913		Filed Mar. 10, 1913
Chicago, Ill.		Interstate Commerce
Un. Pac. Sys.-So.Pac.Co.		Commission

Ballou & Wright

vs.

The New York, New Haven & Hartford Railroad
Company,

Boston & Albany Railroad Company,

Boston & Maine Railroad,

The New York Central & Hudson River Railroad
Company,

The Michigan Central Railroad Company,

Central New England Railway Company,

Erie Railroad Company,

Chicago & Erie Railroad Company,

The Canadian Pacific Railway Company,

Minneapolis, St. Paul & Sault Ste. Marie Railway
Company,

Chicago & North Western Railway Company,

The Chicago, Rock Island & Pacific Railway
Company,

Union Pacific Railroad Company,

Oregon Short Line Railroad Company,

Spokane International Railway Company,

Oregon-Washington Railroad & Navigation Com-
pany.

O W

Chas. H. Bates

Received

Mar. 21, 1913

Official copy

Served by I. C. C.

The petition of the above named complainant respectfully shows:

1. That complainant is a corporation, wholesale dealer in motorcycles, and is located in the City of Portland, State of Oregon.

2. That the defendants above named are common carriers engaged in the transportation of passengers and property by railroad between points in the State of Massachusetts and points in the state of Oregon, and as such common carriers are subject to the provisions of the Act to regulate Commerce, approved February 4th, 1887, and Acts amendatory thereof or supplementary thereto.

3. That this complainant on the several dates hereinafter shown caused to be delivered to the New York, New Haven & Hartford Railroad Company at Armory, Massachusetts, certain carload shipments of motorcycles as hereinafter shown for transportation to this complainant at Portland, Oregon.

4. That on said shipments said defendants assessed and this complainant paid charges based on rate of \$4.00 per 100 cwt. with a minimum carload weight of 15,000 pounds, this complainant having suffered thereby in the sum of \$1732.54, representing the difference between charges assessed and what would have resulted from application of rate of \$2.50 per 100 pounds with minimum carload weight of 15,000 pounds contrary to and in violation of said Act.

5. That Trans-Continental Freight Bureau West-bound Tariff 4-1, I. C. C. 942, issued by R. H. Coun-
tiss, carries a less carload rate of \$4.50 per 100 pounds

and a carload rate of \$4.00 per 100 pounds with a 15,000 pound carload weight on motorcycles.

6. That said Schedule I. C. C. 942 also carries less carload rate of \$4.50 per 100 pounds on bicycles crated and carload rate of \$2.50 per 100 pounds with a 10,000 pound carload minimum.

7. That the difference between carload rate of \$4.00 and less carload rate of \$4.50 on motorcycles results in an unnatural spread and is unduly discriminatory as between carload and less carload freight, and as such is contrary to and in violation of said Act, especially Section 3 thereof.

8. That the rate assessed on the shipments subject of this complaint is in itself and generally in consideration of the services performed and especially with reference to carload rate of \$2.50 per 100 pounds on bicycles, unjust and unreasonable and as such contrary to and in violation of said Act, especially Section 1 thereof, and

9. That a just and reasonable rate applicable to said shipments would be not to exceed \$2.50 per 100 pounds with a 15,000 pound carload minimum.

10. That here follows a detailed statement of the shipment subject of this complaint, showing:

1. Point of shipment.
2. Waybill number and date.
3. Car number and initial.
4. Carriers at interest.
5. Weight and charges assessed.
6. Claimed reparation.

FROM	WAYBILL	CAR	VIA
Armory, Mass. 8/22/12	Springfield CH-3212-8/23/12	M&O-18688	New York, New Haven & Hartford Railroad Company (Springfield), Bos- ton & Albany Railroad Company (Al- bany), New York Central & Hudson River Railroad Company (Buffalo), Michigan Central Railroad Company (Chicago), Chicago & North Western Railway Company (Omaha), Union Pacific Railroad Company (Granger), Oregon Short Line Railroad Company (Huntington), Oregon - Washington Railroad & Navigation Company (Port- land).
Armory, Mass. 7/3/12	Springfield CH-397-7/4/12	LS&MS-59489	"
Armory, Mass. 3/9/12	Springfield CH-675-3/10/12	St.P.-75858	"
Armory, Mass. 1/3/13	Springfield CH-671-1/4/13	C-62384	"
Armory, Mass. 3/25/11	Springfield CH-5730-3/26/11	NYNH-71635	"

WEIGHT	CHARGES	
15,000 lbs.	600.00	
15,000 lbs.	600.00	
15,000 lbs.	600.00	
16,700 lbs.	668.00	
17,300 lbs.	692.00	
79,000 lbs.	3160.00	
Should be 79,000 lbs.	2.50	1975.00

1st Cause of Action, allowed \$3.50 rate.

FROM	WAYBILL	CAR	VIA
Armory, Mass. 5/1/12	Maybrook 570-6/4/12	Erie-69062	New York, New Haven & Hartford Railroad Company (Hartford), Central New England Railway Company (Maybrook), Erie Railroad Company (Mansion), Chicago & Erie Railroad Company (Chicago), Chicago, Rock Island & Pacific Railway Company (Omaha), Union Pacific Railroad Company (Granger), Oregon Short Line Railroad Company (Huntington), Oregon-Washington Railroad & Navigation Company (Portland).

1185.00

4/3/11

OVERCHARGE

WEIGHT	CHARGES	
20,615 lbs.	824.60	
Should be 20,615 lbs.	2.50	515.38

2d Cause of Action, allowed \$3.00 rate.

309.22

11. WHEREFORE, complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation, an order be made commanding said defendants and each of them to cease and desist from the aforesaid violation of said Act to Regulate Commerce, and establish and put in force and apply as maximum in future to the transportation of motorcycles in carloads between Armory, Mass., and Portland, Ore., in lieu of rate of \$4.00 per 100 pounds charged, rate of \$2.50 per 100 pounds with a 15,000 pound carload minimum or such other rate as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore described, the sum of \$1732.54 or such other sum as, in view of the evidence to be adduced herein, the Commission may consider the complainant entitled to, and that such other and further order or orders be made as the Commission may consider proper in the premises and complainant's cause may appear to require.

BALLOU & WRIGHT,

By.....

Portland, Oregon.

Dated at San Francisco, February 26, 1913.

J. O. BRACKEN,

Attorney for Complainant,

656 Pacific Building,

San Francisco, Cal.

(Title omitted)

ANSWER

On behalf of Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company.

Come now defendants Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, appearing for themselves alone, and for answer to complainant's petition herein, admit, deny, and allege as follows, to-wit:

I.

Admit the allegations contained in paragraph I of the petition.

II.

Admit the allegations contained in paragraph II of the petition.

III.

For answer to paragraph III of the petition, these defendants admit that certain carload shipments of motor cycles were transported by defendants from Armory, Massachusetts, to Portland, Oregon. The detail of these shipments, however, cannot at this time be checked and verified and by reason thereof these defendants demand that plaintiffs be required to produce at the trial of this case, their freight bills, bills of lading, etc., substantiating their contention that such shipments actually moved via the lines of these defendants.

IV.

Deny each and every allegation contained in paragraph IV of the petition, except that these defendants admit that charges were assessed on basis of \$4.00 per hundred pounds, carload minimum 15,000 pounds, on such shipments as were transported by these defendants, this being the lawful rate on motorcycles, carloads, from Armory, Massachusetts, to Portland, Oregon. These defendants specifically deny that complainants or anyone else have been damaged therefrom in the sum of \$1732.54, or any other sum or at all, representing difference between charges assessed and what would have resulted from application of rate of \$2.50 per hundred pounds, or any other amount whatever, or at all.

V.

Answering paragraphs V and VI of the petition, these defendants respectfully submit that the Trans-Continental Tariffs on file with the Interstate Commerce Commission as required by law, are the best and most accurate evidence of what is therein contained, and these defendants therefore refer to said Transcontinental Tariffs as showing what rates are and were in effect at the time said shipments moved.

VI.

Deny each and every allegation contained in paragraph VII of the petition, except these defendants admit that the difference between carload rate of \$4.00 and less carload rate of \$4.50 on motorcycles is not sufficiently great, due to the fact that less carload rate is abnormally low. This is one of the inconsistencies in

the tariff that has not been corrected although the subject has been docketed for consideration at the next Trans-Continental Bureau meeting, and these defendants allege that instead of reducing the carload rate as prayed for in the petition, it will be more reasonable and consistent to advance the less carload rate to one and one-half times first class.

VII.

Deny each and every allegation contained in paragraphs VIII and IX of the petition. These defendants specifically deny that a just or reasonable rate on motorcycles would be not to exceed \$2.50 per hundred pounds, minimum 15,000 pounds, from and to the points mentioned in complainants' petition, but allege that the present rates in force and effect are just and reasonable.

VIII.

Deny each and every allegation contained in paragraph X of the petition. These defendants specifically deny that complainants on shipments set forth in paragraph X, have been overcharged in the sum of \$1732.54 or in any other sum or amount whatsoever, or at all.

IX.

Deny each and every allegation contained in paragraph XI of the petition, and these defendants specifically deny that a rate not to exceed \$2.50 per hundred pounds should be established for the future. Deny that complainants are entitled to any reparation whatsoever in this case and deny that reparation in any amount or sum whatever should be allowed.

WHEREFORE, having fully answered complainants' petition herein, these defendants demand that said petition be dismissed.

H. A. SCANDRETT.

N. H. LOOMIS.

P. L. WILLIAMS.

A. C. SPENCER.

State of Oregon,

County of Multnomah—ss.

I, H. E. Lounsberry, being first duly sworn, on oath depose and say that I am General Freight Agent of the Oregon-Washington Railroad & Navigation Company. That I have caused the foregoing answer to be prepared on behalf of the Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, that I know the contents thereof and the same is true as I verily believe.

H. E. LOUNSBERRY.

Subscribed and sworn to before me this 15th day of April, 1913.

JOHN P. HANNON,

(SEAL)

Notary Public for Oregon.

(Title omitted)

ANSWER

of The New York Central & Hudson River Railroad
Company, The Michigan Central Rail-
road Company.

These defendants, for answer to the complaint in the above entitled cause, admit, subject to verification from published tariffs, the rates set forth in the complaint, but deny that same are unjust or unreasonable, unlawful or discriminatory in any respect; deny that complainants are entitled to any relief in the premises, and pray that the complaint may be dismissed.

By O. E. BUTTERFIELD,
Assistant General Solicitor,
La Salle Street Station,
Chicago, Illinois.

CLYDE BROWN,
Of Counsel.

(Title omitted)

ANSWER

1.

The defendants the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and Spokane International Railway Company for their separate answer to the above entitled proceeding state that they admit paragraphs one, two and three of said petition.

2.

Defendants admit that the rates charged on car-load shipments of motor cycles are correctly stated in paragraph four of the complaint.

3.

The defendants the M. St. P. & S. S. M. Ry. Co. and S. I. R. R. Co. state that only one shipment named in the petition moved via their lines and that in all cases these defendants are intermediate lines.

4.

Further answering these defendants state that the Trans-Continental Freight Bureau has under consideration the adjustment of these rates and that such adjustment may obviate the necessity for a hearing and therefore asks that said case be not set for hearing at an early date.

5.

As to all other allegations, this defendant makes a general denial and leaves complainant to its proof.

WHEREFORE, having fully answered, this defendant asks that as to it said complaint be dismissed.

MINNEAPOLIS, ST. PAUL & SAULT STE.

MARIE RAILWAY COMPANY,

By Albert H. Lossow,

Attorney for defendant,

Soo Building, Minneapolis, Minn.

(Title omitted)

Defendant, the Chicago, Rock Island & Pacific Railway Company, for answer to the complaint herein, respectfully states:

I.

It is without any information whatsoever concerning the allegations of paragraph 1, and it leaves complainants to their proof thereof.

II.

Defendant admits that it is a common carrier, engaged in interstate commerce.

III.

Defendant neither admits nor denies the allegations of paragraph 3, but leaves complainants to their proof thereof.

IV.

If said shipments moved, as alleged, defendant denies that complainants suffered in the sum of \$1732.54, or any other sum.

V.

For answer to the allegations of paragraph V, defendant refers to the published tariffs filed with this Commission as affording the best and most trustworthy answer thereto.

VI.

For answer to the allegations of paragraph 6, defendant refers to the published tariffs filed with this Commission as affording the best and most trustworthy answer thereto.

VII.

Defendant denies that the difference between the carload and less than carload rates on motorcycles herein alluded to results in an unnatural spread, as is alleged, or that it is unduly discriminatory as between carload and less than carload freight, or is in violation of Section 3 of the Act to Regulate Commerce.

VIII.

Defendant denies each and every allegation contained in paragraph 8.

IX.

Defendant denies each and every allegation contained in paragraph 9.

X.

Defendant neither admits nor denies that shipments were made, as described in paragraph 10, and it leaves complainants to their proof thereof.

XI.

Defendant denies that the complainants are entitled to the relief prayed for, or to any part thereof, or to any other or further relief, or to any relief whatsoever.

WHEREFORE, having thus fully answered, defendant prays that it be dismissed.

THE CHICAGO, ROCK ISLAND &
PACIFIC RAILWAY COMPANY,

By C. F. Dickinson, its Attorney.

(Title omitted)

ANSWER

Of Defendant Chicago & North Western Railway Company.

Comes now the defendant, Chicago & North Western Railway Company, and for answer to the complaint of complainant alleges:

I.

As to the allegations contained in paragraph I of said complaint, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

II.

Defendant admits the allegations contained in paragraph 2 of said complaint.

III.

As to the allegations contained in paragraphs 3 and 4 of said complaint, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

IV.

Defendant admits the allegations contained in paragraphs 5 and 6 of said complaint.

V.

Defendant admits the allegations contained in paragraphs 7, 8 and 9 of said complaint.

VI.

As to the allegations contained in paragraph 10 of said complaint, this defendant has not and cannot ob-

tain sufficient knowledge or information upon which to base a belief.

WHEREFORE, defendant having fully answered, prays that said complaint may be dismissed.

CHICAGO & NORTH WESTERN
RAILWAY COMPANY,

By C. C. Wright,

Robert H. Widdicome,

Attorneys.

(Title omitted)

The Canadian Pacific Railway Company, one of the defendants mentioned in the above complaint, for answer to the same respectfully states:

1. That it admits the allegations contained in paragraph 1 of the said complaint.
2. That it admits the allegations contained in paragraph 2 of the said complaint.
3. That it has no knowledge of the allegations contained in paragraph 3 of the said complaint.
4. That in regard to the rates mentioned in paragraphs 4, 5, 6, 7 and 8 of the said complaint, this defendant denies that the said rates are unjust, unreasonable or discriminatory or contrary to the Interstate Commerce Act or amendments thereto and that it would respectfully refer the Commission to the Tariffs on file with it setting forth these rates.
5. That it denies the allegations contained in paragraph 9 of the said complaint and states that the rates shown in the tariffs above referred to are reasonable.

6. That it is unable to admit or deny the allegations contained in paragraph 10 of the said complaint, but that if any overcharge exists in respect of any shipments which moved via its line and the charges have been collected in excess of the published tariffs filed with the Commission, this defendant is willing to join in the refund of any such excess.

7. That being an intermediate carrier, it had no voice in the making of the rates now complained of and could not change them.

Dated at Montreal this 30th day of April, 1913.

C. W. BEATTY,
General Solicitor.

(Title omitted)

ANSWER

Of defendants The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Central New England Railroad Company.

The above named defendants for answer to the complaint in this proceeding respectfully state, but only in their own behalf:

1. That as to paragraph 1 said defendants have no knowledge or information upon which to form a belief, and, therefore, leave the proof of the same to the complainant.

2. That paragraphs II and III are admitted.

3. That as to paragraphs IV, V and VI said defendants aver that the charges collected for the transportation of shipments of motorcycles were in accord-

ance with the lawful published tariffs on file with the Interstate Commerce Commission, some of which are enumerated in the above mentioned paragraphs, and the same speak for themselves.

4. That as to paragraphs VII and VIII said defendants deny that the rates charged and collected are unjust, unreasonable or unduly discriminatory.

WHEREFORE, said defendants pray that as to them the complaint in this proceeding may be dismissed.

THE NEW YORK, NEW HAVEN &
HARTFORD RAILROAD COMPANY,
BOSTON & MAINE RAILROAD,
CENTRAL NEW ENGLAND RY. CO.,
S. S. Perry,
Assistant to Vice-President.

(Title omitted)

Erie Railroad Company and Chicago and Erie Railroad Company, for their answer to the petition of the above named complainant, respectfully state:

1. They deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered one and three of said petition, and ask that if deemed material, due proof thereof be made.

2. Being without present available information thereon, they deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered four of said petition, and ask that due proof thereof be made.

3. They deny the allegations contained in paragraphs numbered seven, eight and nine of said petition.

4. Not having been able within the time available, to locate and check the shipment which, in paragraph ten, it is alleged was made over their respective lines, they deny the allegation in that paragraph and ask that due proof be made thereof.

For a further defense they beg to refer to the answer filed, or to be filed, by the carriers reaching the points of destination referred to with their own rails.

WHEREFORE, defendants, Erie Railroad Company and Chicago & Erie Railroad Company, pray that the petition be dismissed and the prayer for reparation be denied.

Dated New York, N. Y.,

April 8, 1913.

ERIE RAILROAD COMPANY,

By D. L. Gray,

Assistant Freight Traffic Manager.

CHICAGO & ERIE RAILROAD COMPANY,

By D. L. Gray,

Assistant Freight Traffic Manager.

T. H. Burgess,

M. E. Pierce,

Attorneys for Respondent.

RESPONDENT'S EX 1.

(Title omitted)

San Francisco, California

September 6, 1913.

12:25 P.M.

Before:

Commissioner JOHN H. MARBLE.

Met pursuant to notice.

APPEARANCES:

J. O. BRACKEN, (Pacific Building, San Francisco, California), appearing for complainant.

GEORGE D. SQUIRES, (San Francisco, California), and R. C. FYFE, (1818 Transportation Building, Chicago, Illinois), appearing for Oregon-Washington Railroad & Navigation Company, defendant.

WITNESSES

C. F. Wright..... 3

R. C. Fyfe.....15

Paul P. Hastings.....27

C. C. Hopkins.....32

C. F. Wright (recalled).....37

PROCEEDINGS

Commissioner Marble: We will take the appearance for complainants in the case of Ballou & Wright, No. 5616.

Mr. Bracken: I represent them.

Whereupon, the following appearance was also entered:

GEORGE D. SQUIRES and R. C. FYFE, for Oregon-Washington Railroad & Navigation Company.

Commissioner Marble: Will you call a witness, Mr. Bracken?

C. F. WRIGHT was called as a witness and having been duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. Bracken: What is your full name?

Mr. Wright: C. F. Wright.

Mr. Bracken: Are you the Wright of the firm of Ballou & Wright?

Mr. Wright: Yes sir.

Mr. Bracken: In this case?

Mr. Wright: Yes sir.

Mr. Bracken: What is the business of your firm?

Mr. Wright: Distributor of mortorcycles, bicycles and automobile supplies.

Mr. Bracken: And where located?

Mr. Wright: Head office in Portland, branch in Seattle, Washington.

Mr. Bracken: Are you familiar with shipments involved in this complaint?

Mr. Wright: Yes sir.

Mr. Bracken: Were the freight charges paid on them by Ballou & Wright?

Mr. Wright: Yes sir.

Mr. Bracken: And were they charged back subsequently to the shipper?

Mr. Wright: No sir.

Mr. Bracken: Is the business of your firm in motorcycles confined to the handling of any particular brand of motoreycles?

Mr. Wright: The carload shipments are confined to one brand.

Mr. Bracken: And that is what?

Mr. Wright: The Indian, manufactured by the Hendee Manufacturing Company, Springfield, Massachusetts.

Mr. Bracken: What is the average value at the factory to you of the Indian motorcycle?

Mr. Wright: Average cost to us?

Mr. Bracken: Cost to you.

Mr. Wright: It is, approximately, \$175.00 to \$180.00.

Mr. Bracken: And what is the weight, the average of the machine?

Mr. Wright: They weigh from 300 to 350, average of 330.

Mr. Bracken: How are they shipped, so far as the package is concerned?

Mr. Wright: They are in a crate, all contained in a crate. Do you want the measurements of the crate?

Mr. Bracken: Yes, you may give them.

Mr. Wright: The height, width and length of crate ready for shipment, the width of the crate is 12 inches, the height $37\frac{1}{2}$ inches, and the length 90 inches, and there is nothing outside, it is all inside, those dimensions.

Mr. Bracken: As to the volume of movement of motorcycles handled by your firm, Mr. Wright, have you looked into the question of volume with reference to whether or not the movement is increasing?

Mr. Wright: Yes sir.

Mr. Bracken: What showing have you as to the movement of motorcycles by you from eastern territory for the year 1907?

Mr. Wright: I have the figures before me.

Mr. Bracken: Read them.

Mr. Wright: 1907, fifteen.

Mr. Bracken: Fifteen what?

Mr. Wright: Fifteen—this is motorcycles.

Commissioner Marble: Fifteen motorcycles?

Mr. Wright: Not carloads, motorcycles. 1908, 80.
1909, 148. 1910, 200.

Mr. Fyfe: I think we can shorten this up materially. We will admit that there has been a tremendous increase in the movement of motorcycles all over the country.

Mr. Wright : 1913, 1200.

Mr. Bracken: From a movement of 15 machines up to 1200.

Commissioner Marble: How many in the carload?

Mr. Wright: We have been shipping about 50. The minimum weight has been 15,000 pounds, and we have been putting about 50 in a car, but a car will contain a great many more than that. The factories have been running with short orders, and when they get 50 machines they shoot them into a car and let them come forward.

Commissioner Marble: How much will they weigh?

Mr. Wright: They average 330 pounds apiece.

Mr. Bracken : As to the liability to damage in the transportation of motorcycles, what has been your experience since you have been handling them?

Mr. Wright : We have made practically no claims.

Mr. Bracken: No claims. Since 1907?

Mr. Wright: I don't believe we have met with \$100.00 worth of damage in that whole time, and the only damage that there has been at all, has been occasionally a chafed tire, but outside of that we haven't had any claims at all, and in those cases only a partial cost of the tire was collected or asked for.

Mr. Bracken: You handle bicycles as well as motorcycles?

Mr. Wright: Yes sir.

Mr. Bracken : What is the average factory value of a bicycle?

Mr. Wright: The factory value, the average, of a complete bicycle, between \$20.00 and \$25.00.

Mr. Bracken: And what will a bicycle weigh?

Mr. Wright: Range from 40 to 50 pounds apiece.

Mr. Bracken: They are shipped crated, the same as the motorcycles?

Mr. Wright: Yes, the same form.

Mr. Bracken: What are the outside measurements of a crated bicycle ready for shipment?

Mr. Wright: Crated, 60 inches in width, $36\frac{3}{4}$ high and 73 inches long.

Mr. Bracken: Have you prepared any figures relative to the average value of a car of motorcycle, as against the average value of a car of bicycles?

Mr. Wright : Well, it will range from—a carload of bicycles you can put 250 in it, into a car, which would mean that a carload of bicycles would be valued at about \$6250.00, while, with a carload of motorcycles, probably \$8500.00 or \$8700.00. Of course there is a difference in the weight. You see, 250 bicycles will only weigh about

10,000 pounds, which is the minimum weight of the car, while a car of motorcycles will weight 15,000 and over.

Mr. Bracken: Did I understand you correctly as to the value of bicycles at the factory?

Mr. Wright: Yes, complete bicycle.

Mr. Bracken: What value did you say it was?

Mr. Wright: From \$20.00 to \$25.00. Those bicycles are shipped, in some instances, stripped without equipment, but I am speaking of the complete bicycle.

CROSS EXAMINATION.

Mr. Fyfe: You said the value of motorcycles is about \$175.00 to \$180.00. Did I understand you correctly?

Mr. Wright: Our cost.

Mr. Fyfe: Your cost?

Mr. Wright: The distributor's cost.

Mr. Fyfe: Now, the price is usually 20 to 25 per cent off the list price, isn't it?

Mr. Wright: Well, to small agents, yes, but the distributors get a larger discount.

Mr. Fyfe: What is your usual discount from the list, in carload lots?

Mr. Wright: 25 and 10.

Mr. Fyfe: 25 and 10—35. Then, a machine that retails for \$375.00 would exceed material—

Mr. Wright: There is no machine retailing for \$375.00 in our line.

Mr. Fyfe: In your line. There are motorcycles that retail for \$375.00?

Mr. Wright: Not that I know of.

Mr. Fyfe: You stated that the average value of bicycles at the factory is \$20.00 to \$25.00?

Mr. Wright: Yes sir.

Mr. Fyfe: On what do you base that opinion?

Mr. Wright: I base that on the average of various makes. Of course different factories—there are medium priced bicycles, high priced bicycles and low priced bicycles. Bicycles list from \$30.00 to \$50.00.

Mr. Fyfe: You would not state that the average value of all bicycles sold in the United States was \$20.00 to \$25.00 at the factory?

Mr. Wright: I would not be competent to make a statement of that kind. I don't know what is sold all over the United States. A manufacturer of bicycles could answer that better than I could.

Mr. Fyfe: All you know about it is the particular machines that you sell.

Mr. Wright: Yes.

Mr. Fyfe: You know that the catalog houses sell a great many bicycles in this western country, such as Sears-Roebuck?

Mr. Wright: Yes sir.

Mr. Fyfe: At \$19.00 retail?

Mr. Wright: Well, they are so-called bicycles, yes.

Mr. Fyfe: They are bicycles, are they not?

Mr. Wright: Yes, they are bicycles.

Mr. Fyfe: They move in material volume, too, do they not?

Mr. Wright: Not in carloads, no sir.

Mr. Fyfe: I mean L. C. L.

Mr. Wright: Not our greatest competitors; they are our smallest competitors.

Mr. Fyfe: Did you ever ship any motorcycles by water?

Mr. Wright: Yes sir.

Mr. Fyfe: Carload lots?

Mr. Wright: Yes sir.

Mr. Fyfe: What rate did you get on them?

Mr. Wright: What rate?

Mr. Fyfe: Yes.

Mr. Wright: \$2.50 in any quantity, L. C. L. or carloads.

Mr. Fyfe: How is the selling price fixed here on the coast on motorcycles?

Mr. Wright: How is it fixed?

Mr. Fyfe: Yes, is it a list price of the manufacturer?

Mr. Wright: Yes sir, in most instances; some agents add their freight and some don't.

Mr. Fyfe: If I remember correctly, it was testified in a case at Chicago that it was customary on the Pacific Coast for dealers in retailing motorcycles to add to the manufacturer's list price \$15.00 to represent the cost of transportation. Is that your custom?

Mr. Wright: That is done by some dealers, and not done by others.

Mr. Fyfe: Is that your custom?

Mr. Wright: We have been doing that, yes sir.

Mr. Fyfe: Then, any motorcycles that you have sold, you have added \$15.00, which has been paid by the purchaser?

Mr. Wright: But that would—

Mr. Fyfe: To the coast?

Mr. Wright: Yes sir.

Mr. Fyfe: He paid the list price as fixed?

Mr. Wright: Yes sir. Excuse me, in figuring the cost value of any article, no matter whether it is a motorcycle or stove or what it may be, freight is always added.

Mr. Fyfe: Then you, yourself, have not paid freight on these, but the freight has actually been paid by the man that purchased it?

Mr. Wright: We have added to the price of our goods—a man in fixing the price of his goods must consider the freight, for the reason that we cannot afford to sell those goods at the eastern list price; we add our freight, add it in any line of goods, no matter whether it be lamps, horns, or anything else, have to consider the freight.

Mr. Fyfe: Then, if this rate is reduced, is not the man that has purchased the motorcycle the man that is entitled to the reduction?

Mr. Wright: He will get the reduction.

Mr. Fyfe: Have you got authority to represent him here and make claim for his account?

Mr. Bracken: That is a question of law that has been passed on a number of times by the Commission and by the Courts.

Commissioner Marble: I wanted to let Mr. Fyfe get enough, so that if he wanted to go to Court on this case he would have the record, that is all—the reason I didn't stop him—or possibly for argument to the Commission that it should reverse its present position.

Mr. Bracken: The \$15.00 item referred to in your reply to question by Mr. Fyfe, doesn't that include not only an allowance for freight, but also cost of handling?

Mr. Wright: All handling charges, yes sir.

Mr. Bracken: So that is not a charge made for freight alone?

Mr. Wright: No sir. This price of our goods not only is for freight, but the goods retail for, say, \$250.00—a motorcycle that retails for that in the east retails by me for \$265.00. That is the price that is tacked on; the customer don't ask how or where that price is arrived at and he is not told. We have to do that on account of the high freight charges. We have had to add to the price of motorcycle horns, because we have had to pay excessive freight charge.

Mr. Fyfe: Then, Mr. Wright, a machine that you pay \$180 for, you retail for \$265.00?

Mr. Wright: Yes sir.

Mr. Fyfe: And in that \$15.00 you add the cost of handling?

Mr. Wright: Why, surely, laid down cost considered in figuring our prices that we are going to get for the machines.

Mr. Fyfe: Then the difference between \$15.00 and the \$180.00 and \$265.00 is your net profit?

Commissioner Marble: That is a fair computation. Is there anything further?

Mr. Fyfe: Nothing further.

(Witness excused.)

Mr. Bracken: I did expect Mr. C. C. Hopkins to testify in the case, but, unfortunately, I haven't got him here, so I will close the case.

COMPLAINANT RESTS.

R. C. FYFE, was called as a witness and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Squires: What is your business?

Mr. Fyfe: Chairman, Western Classification Committee.

Mr. Squires: Your residence is Chicago?

Mr. Fyfe: Chicago.

Mr. Squires: Proceed in your own way and state the facts in reference to this case.

Mr. Fyfe: I desire to dwell on the establishment of the carload rating of first class in Western Classification Committee territory, which became effective June 30, 1913, with a minimum weight of 12,000 pounds, and the same item providing for a mixture with motorcycle side cars.

The first application that the Classification Committee had for a carload rating, was from the Miami Cycle Company, of Middletown, Ohio, in September, 1912. That was prior to the time that the Classification Committee reduced the less than carload rate on the Commission's order from two and one-half times first class to one and one-half times first class, and the Miami Cycle Company petitioned the Committee for a less than carload rating of double first class and a carload rating of one and one-half times first class, 12,000 pounds minimum.

That was followed by applications from the Associated Motorcycle Manufacturers, and the propositions were all consolidated and considered on the April Docket of the Committee Meeting held at St. Louis between

April 1st and April 17th at which time a representative of the Hendee Manufacturing Company, the makers of the Indian motorcycle, Mr. C. F. Dugan appeared and presented a very full argument as to why a carload rating should be established, and prayed for first class with a 12,000 pound minimum, which was the basis in effect in the Official Classification territory.

The position of Mr. Dugan was substantiated by the Reading Standard Company, of Reading, Pennsylvania; the Excelsior Motorcycle Company, of Chicago; the Traffic Manager, Mr. Mullett, of the Harley-Davidson Company, at Milwaukee; Mr. E. J. Knight, General Sales Manager of the Aurora Automatic Machinery Company, of Chicago, manufacturers of the Thor; the American Motor Company, of Boston, Massachusetts; The Hendee Manufacturing Company representative had authority to represent the Pope Manufacturing Company, of Hartford, Connecticut.

When that reduction was made by the Committee, I wrote to all these manufacturers as follows:

"I beg to advise that the Committee authorized the publication of first class rating, carload, minimum weight 12,000 pounds, subject to Rule No. 6-B; also authorized loading of motorcycle side cars with motorcycles in carloads."

The reason for putting in the motorcycle side car, was the fact that it would enable the manufacturers to ship more in carloads than they could otherwise do.

In acknowledgment of that letter, Mr. Dugan, Traffic Manager of the Hendee Manufacturing Company, replied:

"We are in receipt of your valued favor of 3d instant, stating that the Western Classification Committee has authorized publication of first class rating on motorcycles in carload, minimum weight 12,000 pounds, subject to Rule No. 6-B, and would advise that we wish to thank you for this reduction and trust that the new rating will work to the mutual advantage of the railroads and the motorcycle manufacturers."

Our contention in this case is, that first class rating, carload, being in effect in the territory in which the machines are manufactured, and which was established by the Commission in Opinion No. 2168, 26 I. C. C., Page 127, and the fact that the manufacturers prayed to the Classification Committee for this rating, that first class is reasonable and just and the Classification should be permitted to apply on all of this traffic.

We further contend that the complainants are not entitled to any reparation or consideration on the past shipments, on account of the fact that the freight paid has been passed along to the ultimate purchaser.

Commissioner Marble: That will be argument.

Mr. Fyfe: And that to do so in this case, to grant it in this case and not in others, would be discrimination.

That is all.

Mr. Squires: What are the transportation conditions, which, in your judgment, make the first class rate reasonable and just?

Mr. Fyfe: Well, taking into consideration the value, the low minimum weight, which by no means represents what could possibly be loaded in a standard car, and the liability to damage.

The reason for establishing the 12,000 pounds minimum in the west—we endeavored to get a higher minimum—was the fact that it was very strenuously objected to by the manufacturers who held up to us the minimum established by the Commission in official territory, and stated that to force a dealer even in the larger cities to take in excess of 12,000 pounds would be putting an extremely heavy burden on the average dealer, and he might be forced to carry over at the end of the year a large stock of motorcycles which, on account of the changes in construction from year to year, would probably be useless to him and have to be sold at a loss.

Mr. Squires: How about the loss and damage question?

Mr. Fyfe: Oh, there are a great many loss and damage claims on motorcycles, I know that to be a fact, right here in this case.

Mr. Squires: More than on bicycles?

Mr. Fyfe: Well, I couldn't say. I never knew of any claims for damage, to my personal knowledge, for the chafing of tires on bicycles. Last July a year ago when out on the Coast hearing the Classification case, I was in Los Angeles and spent three days around the freight houses in Los Angeles, especially in what is known as their "Old Horse Pile." In the Southern Pacific station and in the Santa Fe station there were numbers of motorcycles that were held up waiting adjustment of damages before the consignee would accept delivery. In numerous instances it was chafing of tires; in others it was where the machine had not been fully crated and fully protected, and the motorcycle had slipped through the openings in the crate and had

punctured either the tire or scratched the machine up, or broke some of the spokes in the wheel, or something in that way. The tire question was so serious that when I went back home I got in touch with the principal motorcycle manufacturers of the country and called their attention to the situation and asked that they bur-lap sufficiently the tires so that they would not chafe through and become damaged in transit. I also suggested several other changes in their crating.

Mr. Squires: What about the question of water competition with reference to bicycles?

Mr. Fyfe: Why, in the Hendee Manufacturing Company complaint, argued by their traffic manager before the Committee, he spoke particularly of the desire to get to the Pacific Coast. He says, "We have got a \$4.00 commodity rate out there, but we don't think it ought to be higher than the first class rating of \$3.70. We would be satisfied with the \$3.70, and we can materially increase our business, I think, even on the Coast and intermediate territory." He said with that carload rating they could make a considerable increase, for the reason that it gives to the jobber a larger profit and it was a greater inducement to him to get out and hustle.

Mr. Squires: Do you think of anything more, Mr. Fyfe?

The bicycle rate is what to the Coast?

Mr. Fyfe: I think the bicycle rate is \$2.50. I would not be sure.

Mr. Squires: And that is fixed with reference to water movement, is it?

Mr. Fyfe: I looked into that and conferred with Mr. Countiss, of the Transcontinental Committee, and

he said that that rate was made to meet water competition and it was a water compelled rate.

Commissioner Marble: Why is there any more competition for bicycles than for motorcycles?

Mr. Fyfe: Well, I don't know, except that in the motorcycle business there is a demand for expedited service. The factories are pretty generally always behind in their orders and they want the stuff rushed through.

Mr. Squires: Do you know whether, as a fact, the boats quote a lower rate on bicycles than on motorcycles?

Mr. Fyfe: I couldn't say as to that, but there is an extremely large volume of the motorcycle business that could not possibly go by boat. There is a big plant at Milwaukee, the Harley-Davidson plant; a plant at Aurora, Illinois. The motorcycle is manufactured at Chicago; there is a plant at Miami, Ohio, Reading, Pennsylvania. All those plants are extremely large plants, and would be forced to pay the local of first class, 12,000 pounds, from Chicago to New York to reach the boats. That would be 75 cents a hundred pounds, 12,000 pounds minimum.

Mr. Squires: But that would not be true with reference to manufacturers situated along the Atlantic Coast, in New England, for instance?

Mr. Fyfe: The Hendee people, Springfield, Massachusetts, who ship from Armory, would be the only people who could take real advantage of any water competition there might be.

Mr. Squires: Is there anything further you desire to say with reference to this matter?

Mr. Fyfe: That is all.

CROSS EXAMINATION.

Mr. Bracken: Did you ever know of any bicycles to move by water to the coast?

Mr. Fyfe: Personally, no.

Mr. Bracken: Then your testimony on that score is absolutely hearsay?

Mr. Fyfe: I have, I think, stated—

Commissioner Marble: He stated he was told by Mr. Countiss—he relied on that basis for his testimony.

Mr. Bracken: I thought he was referring to motorcycles.

Mr. Fyfe: No.

Mr. Bracken: The reduction to first class in Western Classification, to which you refer, Mr. Fyfe, was effective and published subsequent to the filing of this complaint, was it not?

Mr. Fyfe: Yes, but it would have been taken up in July, 1912, had not the Classification been under suspension, and there being no meeting of the Committee between January, 1912, and April, 1913.

Mr. Bracken: But, as a matter of fact, it was not published when the complaint in this case was filed with the Commission?

Mr. Fyfe: No sir.

Mr. Bracken: And there was no notice to the public that it would be published?

Mr. Fyfe: No notice to the public? Why, we had application from the motorcycle manufacturers, the subject went on the published docket, of which 1700 copies are scattered all over this country from the Atlantic to the Pacific Coast, which contains a pretty good notice to the public.

Mr. Bracken: You misunderstood my question. I say, until after the filing of this complaint with the Interstate Commerce Commission there was no notice to the public that first class rate was to be established.

Mr. Fyfe: On no.

Mr. Bracken: At the present time, Mr. Fyfe, both the Official Classification and the Western Classification Committees place bicycles and motorcycles both in less than carload and in carload on a parity, is that correct?

Mr. Fyfe: Except in Western territory, you will find that bicycles are carried at 10,000 pounds minimum, I think.

Mr. Bracken: Yes. That is the only difference?

Mr. Fyfe: Yes.

Mr. Bracken: But, other than that, they are absolutely on a parity in both Classifications?

Mr. Fyfe: Yes, from a Classification standpoint we consider that they are analogous and should be properly rated almost alike.

Mr. Bracken: You are more or less familiar with the making of tariffs, aren't you?

Mr. Fyfe: I am.

Mr. Bracken: In addition to the Western Classification work?

Mr. Fyfe: Yes sir.

Mr. Bracken: Would you say that a spread of \$4.50 less carload and \$4.00 carload a natural spread?

Mr. Fyfe: Why, you will find throughout the Transcontinental Tariff a spread of 50 cents between carload and less than carload rates.

Mr. Bracken: In what tariff?

Mr. Fyfe: The Transcontinental Tariff. You will find thousands of cases of that kind.

Mr. Bracken: I will be glad to hand it to you and have you show me any such instance.

Mr. Fyfe: Well, here is sugar butter, less carload, \$1.50, carload, \$1.00. Here is brass, bronze and copper goods, \$2.00 and \$1.50. I say you will find that spread—

Mr. Bracken: But not between \$4.00 and \$4.50; you have not taken into consideration the percentage of spread at all in your answer, then?

Mr. Fyfe: Oh, no.

Mr. Bracken: Well, would you consider that a natural percentage of spread?

Mr. Fyfe: I would consider that a reasonable spread ordinarily, yes, unless there was some good reason why there should not be or why there should be a greater spread.

Mr. Bracken: Are you at all familiar with the merchandise rates in the T. C. A. Commodity Tariff?

Mr. Fyfe: In the making of them?

Mr. Bracken: No, the rates themselves.

Mr. Fyfe: I have been over the tariff.

Mr. Bracken: Do you know of any carload rate in that commodity tariff, westbound, where it is higher than \$4.00 per hundred on any commodity?

Mr. Fyfe: No, I couldn't say that I do.

Mr. Bracken: Now, Mr. Fyfe, Official Classification No. 31, effective in 1908, published a carload rating on motorcycles, second class, while the current Official Classification, I. C. C. No. O. C. 40, provides first class rating in carloads on motorcycles. Notwithstanding the fact that, as you admitted a short time ago, the volume of movement at this time is much greater than it was at that time. How do you account for the advance in the rate?

Mr. Fyfe: I expect they made up their minds they had motorcycles improperly rated at second class.

Mr. Bracken: That is all.

Mr. Fyfe: Evidently that is it, because they went before the Commission and justified first class. We all make mistakes sometimes in our ratings.

Mr. Bracken: Oh yes, there is no question about that. I didn't know but what you knew, because in view of that fact, the natural movement of the rate would be in the other direction. That is all.

(Witness excused.)

PAUL P. HASTINGS, was called as a witness and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Squires: Mr. Hastings, what is your position with the Santa Fe Railroad Company?

Mr. Hastings: Assistant General Freight Agent.

Mr. Squires: Are you familiar with the rate on motorcycles and bicycles?

Mr. Hastings: Yes sir.

Mr. Squires: What have you to say with reference to the water competition that prevails as between the two commodities?

Mr. Hastings: The California lines were recently considering rates on both commodities to both terminal and intermediate points, and I made it a point to, as fully as I could, investigate the water competition. I secured quotations from three water lines doing business between New York and San Francisco, and those quotations were on motorcycles, from the American-Hawaiian, \$2.50, and on bicycles \$2.00, while the Panama route

were, motorcycles \$2.50, bicycles \$1.80. F. F. Grace & Company, motorcycles \$2.00, bicycles \$1.50; showing a difference of from 50 to 70 cents per hundredweight in the quotations made by the water lines.

In addition to that, I found by investigation that the motorcycle business for San Francisco, at least handling by the Santa Fe, had been very largely from the factories as far as Chicago by express, thence the shipments were turned into our through package car which runs direct on our expedited train from Chicago to San Francisco, and make the fastest time of any freight, via the Santa Fe at least, so that I learned the gist of that was, that the motorcycles are so greatly in demand at times that expedited service, even to the extent of express service part of the way, is a material factor with the dealers, and my conclusion was, as a result of those facts just stated, that there was practically no water competition here today on the motorcycles, but that there is water competition on the bicycles, which forces the present rate of \$2.50 on the latter commodity.

Mr. Squires: That is all.

CROSS EXAMINATION.

Mr. Bracken: I would like to read to you from the testimony in the case of F. Rice, et al; Docket No. 2789, tried in this city some years ago, at which time Mr. Donnelly, representing the Santa Fe Road, testified for this Commission under cross examination.

Commissioner Marble: What page are you going to read from?

Mr. Bracken: From page 55 of the transcript, under re-direct examination; question by Mr. Camp:

"What, in your judgment, determines the rate on bicycles?"

"Mr. Donnelly: What determines the rate on bicycles?"

"Mr. Camp: Yes. Is that fixed by water competition from the east or how?"

"Mr. Donnelly: I don't think they are."

"Mr. Camp: You don't think bicycles move in here by water?"

"Mr. Donnelly: No sir, not to any extent."

Commissioner Marble: How many years ago was that?

Mr. Bracken: 1909.

Mr. Hastings: My investigation was made in July, 1913, and I am very well satisfied that it represented the present conditions.

Mr. Bracken: And you think, Mr. Hastings, that bicycles actually move by water?

Mr. Hastings: I don't know of any actual movement in carload and I don't know of any in less than carload. I did not intend to qualify. I did find, however, that the bicycle people who get bicycles in carloads expressed themselves as not being in such a hurry for their goods, and they stated that they could maintain the \$2.50 rate. We can always get a higher rate, and the Commission understands so, by rail than the water line, as service is better. If we maintain the \$2.50 rate they would continue to ship by rail.

Mr. Bracken: Do I understand from your testimony that you found any different conditions as to the water competitive feature as to the rate on motorcycles

on the one hand, as against the rate on bicycles on the other?

Mr. Hastings: Two very strong differences.

Mr. Bracken: What were they?

Mr. Hastings: One difference in the rate, which I quoted, running from 50 to 70 cents a hundredweight, and the other was the difference in the service demanded.

Mr. Bracken: Well, according to your investigation, did you find any actual movement by water of either of the commodities?

Mr. Hastings: I did not.

Mr. Bracken: Then your testimony only runs to quotations made by water lines?

Mr. Hastings: And the statement I got from a wholesale dealer in bicycles who ships in carloads as to his—what his shipments would be.

Mr. Bracken: Isn't it a fact that 90 per cent of the business that moves by water lines goes under contract rate and not published rate?

Mr. Hastings: If it is, the contract rates are lower. I don't know whether those rates I gave you were published; I got the quotations from the water lines. I don't know whether—the American-Hawaiian Line has what it calls tariff. We have not a copy of it.

Mr. Bracken: It is very seldom they adhere to it?

Mr. Hastings: I understand so.

Commissioner Marble: It is not claimed that there is any competition between bicycles and motorcycles so that any question of discrimination would arise?

Mr. Bracken: Yes, but I can prove that by Mr. Hopkins, who is here now.

Commissioner Marble: Do you claim that the lower rate on bicycles hurts the dealer in motorcycles?

Mr. Bracken: Oh, there is no question about it, if the Commission please. There is absolute discrimination.

(Witness excused.)

C. C. HOPKINS, was called as a witness and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Bracken: Where do you live?

Mr. Hopkins: San Francisco.

Mr. Bracken: What is your business?

Mr. Hopkins: Manager, Hendee Manufacturing Company.

Mr. Bracken: Mr. Hopkins, quite a number of years ago you operated independently in the handling of motorcycles, did you not?

Mr. Hopkins: Yes sir.

Mr. Bracken: How long have you been acting as the San Francisco representative of the Hendee Manufacturing Company?

Mr. Hopkins: Since March, 1910.

Mr. Bracken: You have been handling motorcycles in San Francisco since they first came into commercial use, haven't you?

Mr. Hopkins: Yes sir.

Mr. Bracken: And during that period have you moved any by water?

Mr. Hopkins: Yes sir.

Mr. Bracken: Any considerable number?

Mr. Hopkins: Late in 1911 we had about 150 come out, I think, practically two carloads.

Mr. Bracken: Approximately, how many motorcycles have been handled by you, have been shipped to you from eastern points, per year?

Mr. Hopkins: It has varied greatly. In 1911, it was approximately 600, 1912, 1272, and in the year 1913, 1800—a little over.

Mr. Bracken: What has been your experience as to liability to damage of motorcycles in course of transportation, with respect to the testimony given by Mr. Fyfe on that point?

Mr. Hopkins: Until two years ago I never had a claim.

Mr. Bracken: Until two years ago.

Mr. Hopkins: Yes sir.

Mr. Bracken: From how long ago?

Mr. Hopkins: From 1905.

Mr. Bracken: From 1905 until two years ago you never had a claim?

Mr. Hopkins: No sir.

Mr. Bracken: And then—

Mr. Hopkins: Last year I couldn't tell you the exact amount, and this year it has not been over \$100.00 altogether; about \$100.00, I estimate it roughly.

Mr. Bracken: Did you hear the testimony of Mr. Hastings with reference to the fact that motorcycles move largely by express?

Mr. Hopkins: Yes sir.

Mr. Bracken: Is that your experience?

Mr. Hopkins: We had four samples come out this year.

Mr. Bracken: Just four?

Mr. Hopkins: Only four.

Mr. Bracken: Out of 1800?

Mr. Hopkins: Yes sir.

Commissioner Marble: Any come by express part way and by freight the balance of the way?

Mr. Hopkins: None whatever.

Mr. Bracken: Mr. Hopkins, in the course of the time that you have handled motorcycles, you have also handled bicycles at times, have you not?

Mr. Hopkins: Not since 1906.

Mr. Bracken: Are you familiar with the line?

Mr. Hopkins: No sir, not at present.

Mr. Bracken: Well, are you in position to say whether or not bicycles compete with motorcycles?

Mr. Hopkins: In what way, in sales?

Mr. Bracken: Well, in usage in any way. Is there any competition in a commercial way between bicycles and motorcycles?

Mr. Hopkins: Why, I would not say that there is any to speak of. I may not be competent, because I am not in the bicycle business.

Mr. Bracken: How many bicycles, if you know, moved by water in 1913? Can you say off hand?

Mr. Hopkins: Only the side car attachments, no machines, no motorcycles.

CROSS EXAMINATION.

Mr. Fyfe: Why did you move the side car attachments by water? Was that on account of the—

Mr. Hopkins: Less than carload rate.

Mr. Fyfe: Three times first class, the less than carload rate formerly carried?

Mr. Hopkins: Two and a half times, yes sir.

Mr. Fyfe: With a rate of first class applicable on the motorcycle and the mixture provided at first class, could you use the all-rail route?

Mr. Hopkins: Why, we did as long as we were getting carloads.

Mr. Squires: Did I understand you to say that you are now shipping motorcycles by water?

Mr. Hopkins: No, we have nothing coming now, only these attachments called side cars.

Mr. Squires: When did you discontinue shipping by water?

Mr. Hopkins: We haven't had any motorcycles come by water this year.

Mr. Squires: Did you have any last year?

Mr. Hopkins: I couldn't say definitely. I think we did, a few small lots.

Mr. Squires: What proportion of your shipments come by water in motorcycles?

Mr. Hopkins: Oh, very small.

Mr. Squires: Very small by water?

Mr. Hopkins: Yes sir.

Mr. Squires: And the bulk of them are shipped by rail?

Mr. Hopkins: Two or three years ago there was a different rate in effect and the water was very attractive at that on that account. Since it has been advanced to \$4.00 and \$3.70 as long as we can ship carloads we take advantage of that less than carload—we have had two just recently in less than carloads. They were special order.

Mr. Squires: You get a little better service by rail, too, don't you?

Mr. Hopkins: Ordinarily we do, but I have had some steamer shipments come through in almost as good time, 27 to 30 days.

Commissioner Marble: Why don't you ship by water altogether and get the lower rate?

Mr. Hopkins: We do, a great deal of our goods.

Commissioner Marble: These motorcycles, why don't you ship them by water?

Mr. Hopkins: Busy season can hardly wait for them; bought our shipments in carloads since the minimum has been reduced.

Commissioner Marble: Get them more quickly by rail?

Mr. Bracken: That is all. I would like to recall Mr. Wright:

(Witness excused.)

C. F. WRIGHT, previously sworn, was recalled for further examination and testified as follows:

Mr. Bracken: You have already testified that you handle both motorcycles and bicycles. Is there any commercial competition between them?

Mr. Wright: I would say there was, to a certain extent, yes sir. We sold more bicycles before the motorcycle came into existence.

Mr. Bracken: And the coming into commercial use of the motorcycle, has not that decreased the sale of bicycles?

Mr. Wright: I think it has, yes sir.

CROSS EXAMINATION.

Mr. Squires: Why has the introduction of the motorcycle decreased the sale of the bicycles?

Mr. Wright: It is a speedier vehicle, and people don't like to work any more than they have to nowadays.

Mr. Squires: Don't take so much muscle to work it?

Mr. Wright: That is it.

Commissioner Marble: It is not account of the price at which they are sold?

Mr. Hopkins: Well, not so much.

(Witness excused.)

Mr. Squires: That is our case.

Commissioner Marble: I presume you do not desire oral argument. Take the customary time for briefs, 30, 15 and 10 days.

WHEREUPON, at 1:10 P. M. on the 6th day of September, A. D. 1913, the hearing of the above entitled matter was closed.

Bill of Exceptions filed April 18, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 5th day of May, 1916, there was duly filed in said Court and cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

Respondents in the above entitled cause and court, conceiving themselves aggrieved by the final order and judgment of this Court made and entered in favor of petitioner on the 21st day of February, 1916, and against the respondents the New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company for the sum of \$463.10, together with interest thereon at the rate of six per cent per annum from January 1, 1913, and the further sum of \$300.00 as a reasonable attorney's fee, and the further sum of \$16.00 costs and disbursements aggregating \$866.31; and a further judgment in favor of the petitioner and against the respondents The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company, and J. M. Dickinson as Receiver thereof, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company for the sum of \$206.15, together with interest thereon at the

rate of 6 per cent per annum from January 1, 1913, and the further sum of \$100.00 as a reasonable attorney's fee, and the further sum of \$16.00 costs and disbursements herein, aggregating the sum of \$360.96; and a further judgment in favor of the petitioner and against the respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company for the sum of \$158.88, together with interest thereon at the rate of 6 per cent per annum from January 1, 1913, and the further sum of \$100.00 as a reasonable attorney's fee, and the further sum of \$16.00 as costs and disbursements, aggregating the sum of \$304.78. And in the ruling and findings of fact and conclusions adopted by the court and in the refusal of the Court to adopt certain findings of fact and conclusions of law requested by respondents in said cause made as set forth in their assignments of error filed herein, petitions said Court for an order allowing said respondents to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignments of error filed herewith, under and in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit in that behalf made and provided, and also that an order be made fixing the amount of security which the respondents shall give and furnish upon said writ of error, and that upon giving such security all further proceedings in this Court be suspended and stayed until the dismissal of said writ

of error by the United States Circuit Court of Appeals, and relative thereto said respondents respectfully show that by reason of the premises manifest error hath happened to the great damage of the respondents herein.

That respondents have filed herewith assignments of error upon which they will rely and will urge in the said Court of Appeals.

WHEREFORE, respondents pray that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this Court for the correction of the errors so complained of, and that a transcript of record of the proceedings, papers and all things concerning same upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgments may be reversed and that respondents severally recover judgment as demanded in their answers.

H. A. SCANDRETT,
W. W. COTTON,
CHARLES E. COCHRAN,
Attorneys for Respondents.

Filed May 5, 1916.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 5th day of May, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Come now the respondents above named, appearing by W. W. Cotton, H. A. Scandrett and C. E. Cochran, their attorneys of record, and say:

That the judgment and final order of this Court, made, rendered and entered in the above entitled Court on the 21st day of February, 1916, in favor of the petitioner above named and against the respondents in three groups as indicated in the petition for writ of error, is erroneous and against the just rights of these respondents, and file herein together with their petition for writ of error, the following assignments of error, which respondents aver occurred upon the trial of said cause.

I.

The Court erred in refusing to permit the witness, W. J. Finke to answer the following question:

Q. What sums did you add to that price?

(Meaning the list price prescribed by the manufacturer.)

And further erred in refusing to permit respondents to offer in evidence testimony in substance as follows, to-wit:

That as to all the machines shipped and covered by the facts set forth in the complaint, amounting to substantially 1200 machines, they were all sold for a price \$15.00 in excess of the list price, save and except as to about 25 machines, and that that \$15.00 was added for

the purpose of covering the freight as assessed by the railroad company, being the rate complained of before the Interstate Commerce Commission.

II.

The Court erred in refusing to permit the witness W. J. Finke to answer the following question:

“Isn’t it a fact, in selling each and every of these machines, except the 25, that each customer was told that the \$15.00 in excess of the catalogue list price was for the purpose of covering the freight?”

And further erred in refusing to permit testimony in accordance with an offer made at the time as follows:

“That each customer to whom the \$15.00 in excess of list price was charged, was told in the regular course of the trade and of the business, that that charge was for the purpose of covering the freight; and that it did cover the freight, leaving a little besides.”

III.

The Court erred in refusing to permit the witness W. J. Finke to answer the following question:

“Q. Mr. Finke, isn’t it a fact that all of the motorcycle dealers in the western territory, western part of the United States, during the times complained of in this case, followed the same practice and custom that Messrs. Ballou & Wright have followed, in relation to buying the motorcycles f. o. b. factory, paying the freight, adding the freight to the price of the machine to the trade, and recouping themselves in that way?”

And further erred in refusing to permit evidence in accordance with an offer made at the time as follows, to-wit:

That the practice and custom of adding the freight to the price of the motorcycles to the trade was of general application, and was indulged in by all of the standard motorcycle dealers in the West.

IV.

The Court erred in finding as a fact from the evidence the following:

(7) About February 3, 1914, the Interstate Commerce Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its order and decision in said cause set out in the petition herein, and admitted in the answer herein, in which order and decision the said Interstate Commerce Commission among other things decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as afore-said, was unreasonable to the extent that it exceeded the said first class rate in effect at the time said shipments of motorcycles were made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first class rate contemporaneously in effect.

V.

The Court erred in finding as a fact the following:

(8) About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause

wherein the petitioner herein was complaint and the respondents herein were defendants, made, rendered and entered of record its order of reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said order of reparation the said Interstate Commerce Commission, among other things, ordered that said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said complainant in said cause, the petitioner herein, the sum of \$463.10, with interest thereon at the rate of 6 per cent per annum from January 1, 1913, as reparation on account of said unreasonable rate charged for the transportation of said motorcycles in carloads from Armory, Mass., to Portland, Oregon.

VI.

The Court erred in finding as a fact from the evidence the following:

10. The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipments, was and is unreasonable to the extent that it exceeded the first-class rate in effect at the time the said shipments were made, from Armory, Mass., to Portland, Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount

so charged and collected on said shipments, and the amount petitioner would have paid at the said first-class rate, contemporaneously in effect, to wit: in the sum of \$463.10, with interest thereon at the rate of 6% per annum from the 1st day of January, 1913.

VII.

The Court erred in finding as a fact from the evidence the following:

14. About February 3, 1914, the Interstate Commerce Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendants, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its Order and Decision in said cause set out in the petition herein, and admitted in the answer herein, in which Order and Decision the said Interstate Commerce Commission among other things decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as aforesaid, was unreasonable to the extent that it exceeded the said first-class rate in effect at the time said shipments of motorcycles were made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first-class rate contemporaneously in effect.

VIII.

The Court erred in finding as a fact from the evidence the following:

15. About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause wherein the petitioner herein was complainant and the respondents herein were defendants, made, rendered and entered of record its Order of Reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said Order of Reparation the said Interstate Commerce Commission among other things ordered that said respondents, the New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said complainant in said cause, the petitioner herein, the sum of \$206.15 with interest thereon at the rate of 6% per annum from January 1st, 1913, as reparation on account of said unreasonable rate charged for the transportation of said motorcycles in carloads from Armory, Mass., to Portland, Oregon.

IX.

The Court erred in finding as a fact from the evidence the following:

(17) The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipment, was and is unreasonable to the extent that it exceeded the first-class rate in effect at the time the said shipment was made, from Armory, Mass., to Portland,

Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount so charged and collected on said shipment, and the amount petitioner would have paid at the said first-class rate, contemporaneously in effect, to wit: in the sum of \$206.15, with interest thereon at the rate of 6% per annum from the 1st day of January, 1913.

X.

The Court erred in finding as a fact from the evidence the following:

(21) About February 3, 1914, the Interstate Commerce Commission in a cause wherein the petitioner herein was complainant, and the respondents herein were defendant, upon the admissions appearing in the pleadings in said cause, and based upon the testimony offered and admitted therein, made, rendered and entered its order and decision in said cause, set out in the petition herein, and admitted in the answer herein, in which Order and Decision the said Interstate Commerce Commission among other things decided and held that the said commodity rate of \$4.00 per cwt. charged and collected by the said respondents from the said petitioner as aforesaid, was unreasonable to the extent that it exceeded the said first-class rate in effect at the time said shipment of motorcycles was made; and that the said petitioner was damaged in an amount equal to the difference between the said amount charged and collected from the said petitioner by the said respondents, and the amount the said petitioner would have paid at the said first-class rate contemporaneously in effect.

XI.

The Court erred in finding as a fact from the evidence the following:

(22) About the 14th day of August, 1914, the said Interstate Commerce Commission in the said cause wherein the petitioner herein was complainant and the respondents herein were defendants, made, rendered and entered of record its Order of Reparation, set out in the petition herein and admitted in the answer of respondents herein, in which said Order of Reparation the said Interstate Commerce Commission among other things ordered that said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, on or before October 1st, 1914, pay unto the said complainant in said cause, the petitioner herein, the sum of \$158.88, with interest thereon at the rate of 6% per annum from January 1st, 1913, as reparation on account of said unreasonamle rate charged for the transportation of said motoreycles in carloads from Armory, Mass., to Portland, Oregon.

XII.

The Court erred in finding as a fact from the evidence the following:

(24) The Court further finds that said commodity rate of \$4.00 per cwt. charged and collected from the said petitioner by the said respondents on the said shipments, was and is unreasonable to the extent that it ex-

ceeded the first-class rate in effect at the time the said shipment was made, from Armory, Mass., to Portland, Oregon; and that petitioner was and is damaged in an amount equal to the difference between the said amount so charged and collected on said shipments, and the amount petitioner would have paid at the first-class rate, contemporaneously in effect, to wit: in the sum of \$158.88, with interest thereon at the rate of 6% per annum from the first day of January, 1913.

XIII.

The Court erred in finding as a fact from the evidence the following:

(27) The Court finds that all of the allegations in the petition herein have been fully sustained and proved by competent evidence.

XIV.

The Court erred in its conclusions of law as follows:

1. That the measure of damages to petitioner herein is the difference between the amount collected by the said respective respondents and paid by the said petitioner on the said respective shipments, and the amount the petitioner would have paid at the said first-class rate in effect at the time the said respective shipments moved, to wit: the said respective amounts hereinbefore stated, in the findings of fact herein.

XV.

The Court erred in refusing to find in lieu of its Conclusion No. 1, the following:

That the measure of damages in this case is not the difference between the rate charged by the respondents

for the shipments complained of in the complaint and the sum which the petitioner would have paid had the rate been assessed in the amount fixed by the Interstate Commerce Commission as reasonable.

XVI.

The Court erred in the following Conclusion of Law:

2. That the said petitioner is entitled to judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Albany Railroad Company, The New York Central & Hudson River Railroad Company, The Michigan Central Railroad Company, Chicago & Northwestern Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad & Navigation Company, in the sum of \$463.10, together with interest thereon at the rate of 6% per annum from the first day of January, 1913, and the further sum of \$300.00, a reasonable attorney's fee herein, and for its costs and disbursements herein.

XVII.

The Court erred in the following Conclusion of Law:

3. That the said petitioner is entitled to judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Central New England Railway Company, Erie Railroad Company, Chicago & Erie Railroad Company, Chicago, Rock Island & Pacific Railway Company and J. M. Dickinson as Receiver thereof, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-

Washington Railroad & Navigation Company in the sum of \$206.15 together with interest thereon at the rate of 6% per annum from the first day of January, 1913, and the further sum of \$100.00, a reasonable attorney's fee herein, and for its costs and disbursements herein.

XVIII.

The Court erred in the following Conclusion of Law:

4. That the said petitioner is entitled to judgment against the said respondents, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, Canadian Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Spokane International Railway Company and Oregon-Washington Railroad & Navigation Company, in the sum of \$158.88, together with interest thereon at the rate of 6% per annum from the first day of January, 1913, and the further sum of \$100.00 as a reasonable attorney's fee herein, and for its costs and disbursements herein.

XIX.

The Court erred in refusing to make a Finding of Fact as follows:

4. That between the dates of March 25, 1911, and January 1, 1913, the petitioner shipped from Armory, Massachusetts, to Portland, Oregon, seven carloads of motorcycles weighing 115,503 pounds, and that the freight collected by the respondents was based upon a commodity rate of \$4.00 per hundred pounds, which the respondents had published and on file with the Commission, amounted to the sum of \$4,620.12.

XX.

The Court erred in refusing to make a Finding of Fact as follows:

6. The Court further finds that the difference between the rate charged petitioner by respondents and the rate fixed by the Commission in said proceedings as being the reasonable rate applicable to and assessable against the transportation of motorcycles from Armory, Massachusetts, to Portland, Oregon, computed upon the number of pounds the shipments of motorcycles weighed that moved under said tariff and within said times in specie would be the sum of \$838.13, and that the only way said sums could have been arrived at by the Commission was by measuring the damage by taking the difference between the rate charged by the carrier and the rate fixed by the Commission as being reasonable.

XXI.

The Court erred in refusing to make a Finding of Fact as follows:

7. The Court further finds that the petitioner in respect to motorcycles is a wholesale and retail dealer therein, having a contract with the manufacturer at Armory, Massachusetts, assuring to the petitioner the exclusive right to the sale and distribution of motorcycles in the State of Oregon and portions of the States of Idaho and Washington, and that the manufacturer fixed the retail price by means of public catalogues listing the same at which motorcycles were to be sold to the trade; that Ballou & Wright purchased said motorcycles f. o. b. Armory, Massachusetts, and caused the

same to be shipped and delivered to them at Portland, Oregon, they paying the freight thereon; that Messrs. Ballou & Wright, petitioner herein, did sell each and all of said motorcycles to the trade within their exclusive district at said factory list price, together with the sum of Fifteen (15.00) Dollars additional on each and every motorcycle, which was for the purpose of and did cover the freight chargeable to each motorcycle and based upon said commodity rate of \$4.00 per hundred pounds, and at the time each transaction took place in the sale of each motorcycle the purchaser was told in the regular course of the company's business that the said sum of \$15.00 was the freight on said motorcycles and that the purchaser was obtaining the same at the factory list price, plus the freight, and that each and all of said motorcycles were sold in the same way; that the said sum of \$15.00 did in all cases, save and except to twenty-five motorcycles, cover said freight and leave a small profit besides.

XXII.

The Court erred in refusing to make a Finding of Fact as follows:

9. The Court further finds that in the transaction of the motorcycle business in the purchase and distribution of the same to the trade in the district for which Messrs. Ballou & Wright had the exclusive rights, that they received from the trade sufficient amounts of money to cover the freight as they paid to the respondents, and the profits of petitioner was not in any way affected by said rate complained of.

XXIII.

The Court erred in refusing to make a Finding of Fact as follows:

10. The Court further finds that there is no evidence introduced respecting damages, such as loss of profits, expenses in meeting competition, loss of profits on sales in competitive territory, and under the contract giving Messrs. Ballou & Wright the exclusive agency for certain territory, that there was no competitive territory from which Messrs. Ballou & Wright were excluded.

XXIV.

The Court erred in refusing to make a Finding of Fact as follows:

11. That the amount of freight which Messrs. Ballou & Wright paid upon the entire shipments was the sum of \$4620.12; that the amount of money that would have been paid if the freight were assessed at the rate fixed by the Commission as being reasonable would have been the sum of \$3781.99, and that the excess charged above the Commission found reasonable rate was the sum of \$838.13.

XXV.

The Court erred in refusing to conclude as a matter of law, as follows:

1. That the measure of damages in this case is not the difference between the rate charged by the respondents for the shipments complained of in the complaint and the sum which the petitioner would have paid had the rate been assessed in the amount fixed by the Interstate Commerce Commission as reasonable.

XXVI.

The Court erred in refusing to conclude as a matter of law, as follows:

2. That under the method pursued by the petitioner for the transaction of the business in relation to said motorcycles, the measure of the damage suffered by petitioners is the interest at the legal rate, which in this state is six per cent upon the sum of \$838.13, being the difference between the freight computed at the two rates from the time the same were paid to the carrier until the time the same was returned in the due course of business from the trade, but that there is no date or ultimate facts proved by said testimony upon the theory of the petitioner, to which to apply said measure of damage.

XXVII.

The Court erred in refusing to conclude as a matter of law, as follows:

3. That the respondents should have judgment for their costs and disbursements of this action.

XXVIII.

The Court erred in adopting and signing the findings of fact and conclusions of law presented by the petitioner, and erred in declining to sign and adopt the Findings of Fact and Conclusions of Law presented by the respondents.

XXIX.

The Court erred in entering judgment in favor of the petitioner and against the three several groups of

respondents in the manner and form entered, and in refusing and declining to enter judgment in favor of the respondents for their costs and disbursements.

H. A. SCANDRETT,

W. W. COTTON,

CHARLES E. COCHRAN,

Attorneys for Respondents.

Filed May 5, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Friday, the 5th day of May, 1916, the same being the 53rd judicial day of the regular March, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER ALLOWING WRIT OF ERROR.

This 5th day of May, 1916, came the respondents above named, appearing by Messrs. H. A. Scandrett, W. W. Cotton and Charles E. Cochran, their attorneys of record, and filed herein and presented to the Court their petition praying for the allowance of a Writ of Error from the decision and judgment of this Court, made and entered on the 21st day of February, 1916, in favor of the petitioner, above named, and against the respondents, and against the ruling and findings of fact and conclusions of law made on the trial of the above entitled cause, out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this Court, together with certain assignments of error intended to be urged by them within due time, and also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which respondents shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit,

and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, on consideration thereof this Court does allow said writ of error upon said respondents' filing with the Clerk of this Court a good and sufficient bond in the sum of Three Thousand (\$3000.00) Dollars, to the effect that if said respondents shall prosecute the said writ of error to effect and answer all damages and costs, if respondents fail to make their plea good, then said bond to be void, otherwise to remain in full force and virtue; said bond to be approved by this court, and it is ordered that all further proceedings in this court be, and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bond shall operate as a supersedeas bond.

Dated this 5th day of May, 1916.

R. S. BEAN,
Judge.

Filed May 5, 1916. G. H. MARSH, Clerk.

And afterwards, to wit, on the 5th day of May, 1916, there was duly filed in said Court and cause, a Bond on Writ of Error, in words and figures as follows, to wit:

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, that The New York, New Haven & Hartford Railroad Company, a corporation; Boston & Maine Railroad, a corporation; Central New England Railway Company, a corporation; The New York Central & Hudson River Railroad Company, a corporation; The Michigan Central Railroad Company, a corporation; Erie Railroad Company, a corporation; Chicago & Erie Railroad Company, a corporation; The Canadian Pacific Railway Company, a corporation; The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation; Spokane International Railway Company, a corporation; Chicago & North Western Railway Company, a corporation; The Chicago, Rock Island & Pacific Railway Company, a corporation, and J. M. Dickinson, as Receiver thereof; Boston & Albany Railroad Company, a corporation; Union Pacific Railroad Company, a corporation; Oregon Short Line Railroad Company, a corporation; Oregon-Washington Railroad & Navigation Company, a corporation, respondents, as Principals, and National Surety Company, a corporation, Surety, are held and firmly bound unto Ballou & Wright, a corporation, the plaintiff above named, in the sum of Three Thousand (\$3000.00) Dollars, to be paid to the said Ballou & Wright, its successors and assigns, to which payment well and truly to be made, we bind ourselves, and each of

us jointly and severally, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 2nd day of May, 1916.

WHEREAS, the above named respondents are prosecuting the writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled cause by the District Court of the United States for the District of Oregon entered on the 21st day of February, 1916.

Now, the condition of this obligation is such, that if the above named respondents shall prosecute said Writ of Error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation to be void, otherwise to be and remain in full force and effect.

THE NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY,

By C. E. Cochran,
Its Attorney.

BOSTON & MAINE RAILROAD,

By C. E. Cochran,
Its Attorney.

CENTRAL NEW ENGLAND RAILWAY COMPANY,

By C. E. Cochran,
Its Attorney.

THE NEW YORK CENTRAL & HUDSON RIVER
RAILROAD CO.,

By C. E. Cochran,
Its Attorney.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
By C. E. Cochran,
Its Attorney.

ERIE RAILROAD COMPANY,
By C. E. Cochran,
Its Attorney.

CHICAGO & ERIE RAILROAD COMPANY,
By C. E. Cochran,
Its Attorney.

THE CANADIAN PACIFIC RAILWAY COMPANY,
By C. E. Cochran,
Its Attorney.

THE MINNEAPOLIS, ST. PAUL & SAULT STE.
MARIE RAILWAY COMPANY,
By C. E. Cochran,
Its Attorney.

SPOKANE INTERNATIONAL RAILWAY COMPANY,
By C. E. Cochran,
Its Attorney.

CHICAGO & NORTH WESTERN RAILWAY
COMPANY,
By C. E. Cochran,
Its Attorney.

THE CHICAGO, ROCK ISLAND & PACIFIC RAIL-
WAY COMPANY AND J. M. DICKINSON, AS
RECEIVER,
By C. E. Cochran,
Its Attorney.

BOSTON & ALBANY RAILROAD COMPANY,
By C. E. Cochran,
Its Attorney.

UNION PACIFIC RAILROAD COMPANY,

By C. E. Cochran,

Its Attorney.

OREGON SHORT LINE RAILROAD COMPANY,

By C. E. Cochran,

Its Attorney.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY,

By C. E. Cochran,

Its Attorney.

Principals.

National Surety Company,

Marc Hubbard,

Resident Vice-President.

Attest: M. H. CROWE,

Resident Asst. Secretary.

(Seal, National Surety)

(Company)

Surety.

Countersigned at Portland, Oregon, this 2d day of
May, 1916.

NATIONAL SURETY COMPANY,

By MARC HUBBARD,

Resident Agent.

Examined and approved this 5th day of May, 1916.

R. S. BEAN,

Judge.

Filed May 5, 1916.

G. H. MARSH, Clerk.

And Afterwards, to-wit, on the 28th day of May, 1916, there was duly filed in said court, and cause, a Praecipe for Transcript, in words and figures as follows, to-wit:

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please prepare transcript of the complete record in the above entitled case, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the Writ of Error issued to this Court, and include in said transcript the following proceedings, pleadings, papers, records and files:

1. Complaint, omitting title.
2. Answers, including amendments, omitting title.
3. Demurrer to Answer and amendment, omitting title.
4. Order sustaining Demurrer, or a statement that Demurrer was sustained.
 Stipulation waiving jury.
 Reply.
 Findings of Fact and Conclusions of Law.
5. Judgment.
 Findings of Fact and Conclusions of Law proposed by Defendants.
6. Bill of Exceptions and Certificate.
7. Petition for Writ of Error.
8. Assignment of Errors.
9. Order allowing Writ of Error and fixing bond.
10. Supersedeas Bond and Bond for Costs.

11. Writ of Error.
12. Citation on Writ of Error, showing service.
13. Order extending time to file Transcript.
14. Stipulation as to printing record.
15. This Praecipe.

And any and all records, entries, pleadings, proceedings, papers and files necessary and proper to make a complete record upon said Writ of Error in said cause. Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

W. W. COTTON,
H. A. SCANDRETT,
C. E. COCHRAN,
Attorneys for Respondents.

Filed May 25, 1916.

G. H. MARSH, Clerk.

And Afterwards, to-wit, on the 2nd day of June, 1916, there was duly filed in said Court and cause, a Stipulation as to Printing Record, in words and figures as follows, to-wit:

STIPULATION AS TO PRINTING RECORD.

It is Stipulated and Agreed between counsel for the plaintiff and the defendants, that the Clerk of the District Court in printing the record in this cause, shall observe the following directions:

First: The Writ of Error be printed in full, including the title.

Second: All other documents, the title shall be omitted.

Third: The exhibits to the Bill of Exceptions, consisting of pleadings and testimony taken before the Interstate Commerce Commission shall be printed, omitting title.

WILL H. BARD and
JAMES E. FENTON,
Attorneys for Petitioner.

C. E. COCHRAN,
Of Attorneys for Respondents.

Filed June 2, 1916.

G. H. MARSH, Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

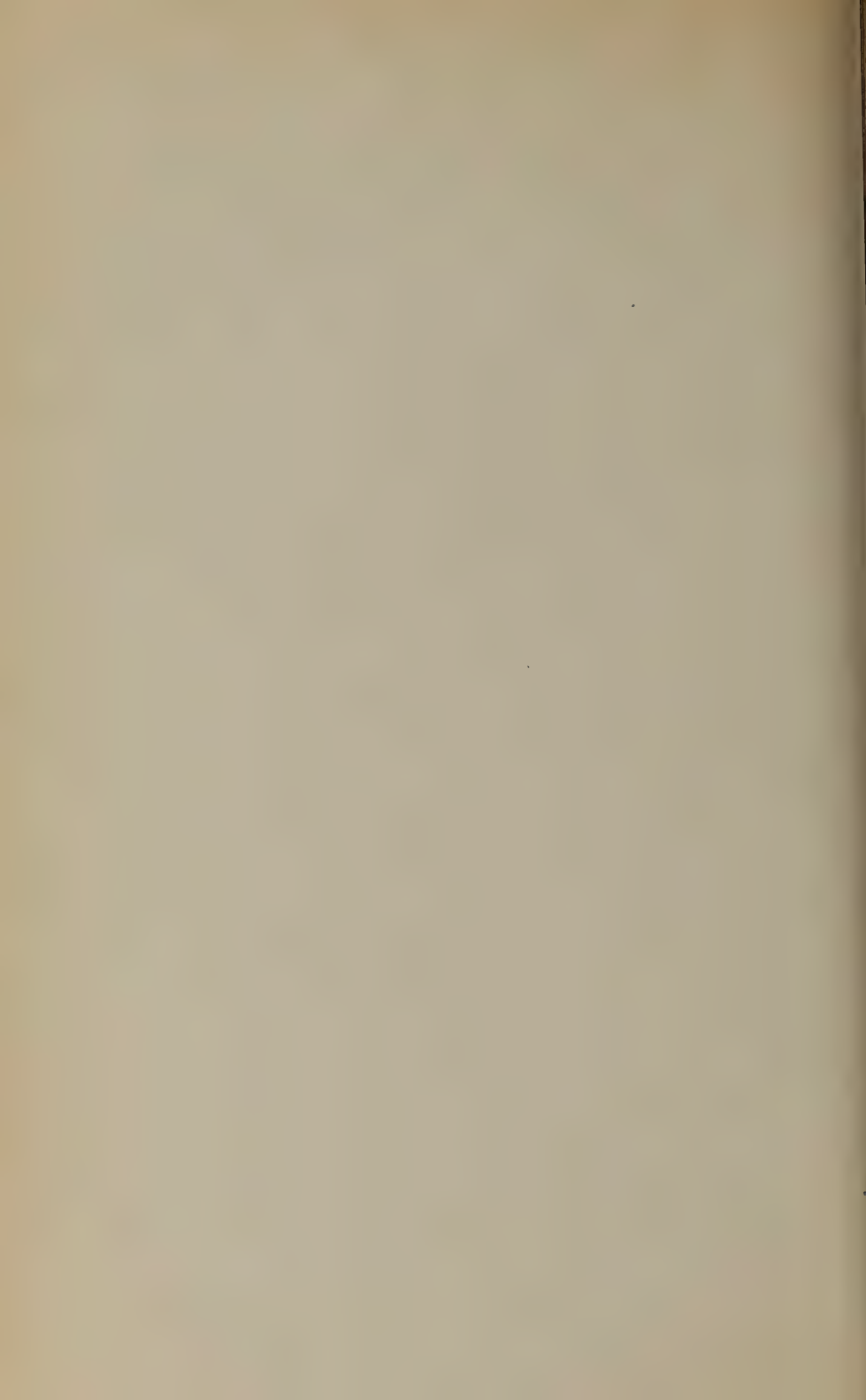
I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing printed transcript of record, in the case in said court of Ballou & Wright, a corporation, Plaintiff and Defendant in Error, against the New York, New Haven & Hartford Railroad Company and others, Defendants and Plaintiffs in Error, has been prepared by me in accordance with law and the rules of court, and in accordance with the direction of the praecipe for transcript filed in said cause by said Plaintiffs in Error, and that the said transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$., for printing said record, and that the same has been paid by said Plaintiffs in Error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this day of August, 1916.

.....

Clerk.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, BOSTON & MAINE RAILROAD, a corporation, CENTRAL NEW ENGLAND RAILWAY COMPANY, a corporation, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation, THE MICHIGAN CENTRAL RAILROAD COMPANY, a corporation, ERIE RAILROAD COMPANY, a corporation, CHICAGO & ERIE RAILROAD COMPANY, a corporation, THE CANADIAN PACIFIC RAILWAY COMPANY, a corporation, THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a corporation, SPOKANE INTERNATIONAL RAILWAY COMPANY, a corporation, CHICAGO & NORTHWESTERN RAILWAY COMPANY, a corporation, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a corporation, and J. M. DICKINSON, as Receiver thereof, BOSTON & ALBANY RAILROAD COMPANY, a corporation, UNION PACIFIC RAILROAD COMPANY, a corporation, OREGON SHORT LINE RAILROAD COMPANY, a corporation, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,

Defendant in Error.

BRIEF OF COUNSEL FOR PLAINTIFFS IN

Filed

Upon Writ of Error to the District Court of the United States for the District of Oregon.

E. D. Monckton,

Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation, BOSTON & MAINE RAILROAD, a corporation, CENTRAL NEW ENGLAND RAILWAY COMPANY, a corporation, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation, THE MICHIGAN CENTRAL RAILROAD COMPANY, a corporation, ERIE RAILROAD COMPANY, a corporation, CHICAGO & ERIE RAILROAD COMPANY, a corporation, THE CANADIAN PACIFIC RAILWAY COMPANY, a corporation, THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a corporation, SPOKANE INTERNATIONAL RAILWAY COMPANY, a corporation, CHICAGO & NORTHWESTERN RAILWAY COMPANY, a corporation, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a corporation, and J. M. DICKINSON, as Receiver thereof, BOSTON & ALBANY RAILROAD COMPANY, a corporation, UNION PACIFIC RAILROAD COMPANY, a corporation, OREGON SHORT LINE RAILROAD COMPANY, a corporation, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,

Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

**THE NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY, a corporation, et al,**
Plaintiffs in Error

vs.

BALLOU & WRIGHT, a corporation,
Defendant in Error

Names and Addresses of the Attorneys of Record.

**MR. H. A. SCANDRETT, 58 East Washington Street,
Chicago, Illinois.**

**MR. ARTHUR C. SPENCER and MR. CHARLES E. COCH-
RAN, 510 Wells Fargo Building, Portland, Ore-
gon, for the Plaintiffs in Error.**

**MR. WILL H. BARD, Pittock Building, Portland,
Oregon, and MR. JAMES E. FENTON, Claus
Spreckles Building, San Francisco, California,
for the Defendant in Error.**

STATEMENT OF THE CASE.

For several years prior to the 10th day of March, 1913, the plaintiffs in error, as connecting carriers from Armory, Massachusetts to Portland, Oregon, had published and filed with the Interstate Commerce Commission, a commodity rate on motorcycles in carload lots of \$4.00 per hundred pounds, with a minimum carload weight of fifteen thousand pounds. Likewise, during the time prior to March 9, 1912, there was issued, published, filed and effective with the Interstate Commerce Commission, certain class rates contained in Transcontinental Freight Bureau West-bound Tariff 4-I, I. C. C. No. 942, issued by R. H. Countiss, which carried a first-class rate of \$3.00 per hundred pounds from Armory, Massachusetts, to Portland. Also between March 9, 1912, and January 3, 1913, the first-class rate between Armory, Massachusetts, and Portland, Oregon, was \$3.70 per hundred pounds. The class rates from common points with Armory, Massachusetts, are all referable to a certain tariff document filed with the Interstate Commerce Commission, known as the Western Classification. This document was concurred in by all the Western railroads and approved by the Interstate Commerce Commission, and its object and purpose is to classify various commodities so as to determine the application of the class rates above referred to.

In the Western classification, motorcycles are rated as first class, but whenever a carload commodity rate is established, it removes the applica-

tion of class rates to or from the same points on that commodity in carload quantities.

On the 10th day of March, 1913 (Trans. p. 17), the defendant in error filed its petition with the Interstate Commerce Commission, claiming in substance that the commodity rate of \$4.00 per hundred pounds, with minimum carload weight of 15,000 pounds on motorcycles from Armory, Massachusetts, to Portland, Oregon, was unjust and unreasonable and contrary to and in violation of Section 1 of the Act to Regulate Commerce.

The shipments in question moved from Armory, Massachusetts, to Portland, Oregon, under a duly posted, published and filed commodity rate of \$4.00 per hundred pounds in carload lots, and this rate was assessed and collected by the carriers.

Issues were formed by the carriers, parties to the proceeding, tendering answers (Trans. 148, 152, 154, 156, 157, 158 and 159). Testimony was taken (Respondent's Exhibit 1, Trans. 161 to 189 inclusive).

On February 3, 1914, from such record the Commission made a

"REPORT IN WRITING IN RESPECT THERETO."

(Section 14, Act to Regulate Commerce, as amended March 2, 1889, and June 29, 1906.) (Trans. 25.)

We quote a portion of the Commission's report (Abstract 27):

"For the reasons given in cases referred to herein and on this record, we are of opinion and find:

(a) That the rate charged complainant on the shipments made by it was unreason-

4 *New York, New Haven & Hartford R. R. Co.*

able to the extent it exceeded the first-class rate in effect at the time the shipments were made.

We further find:

(b) That the complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect, and

(c) That it is, therefore, entitled to an award of reparation.

(d) On this record, however, the amount of reparation cannot be determined."

(We have divided the findings into paragraphs (a), (b), (c) and (d) for convenience.)

The Commission's holding further directed the defendant in error to prepare a statement showing as to each shipment upon which reparation is claimed, the date of removal, point of origin, point of destination, route, weight, car number and initial, rate applied, charges collected and the amount of reparation due, based upon the first-class rate contemporaneously in effect. This statement, with the freight bills covering the shipments, was required to be submitted to the plaintiffs in error for verification, and the same was verified, returned and filed with the Commission.

Of course, in checking the correctness of complainant's statement, the carriers were not conceding such information to be material to an issue of the proper measure or quantum of damage defendant in error claimed to have suffered on account of having to pay the commodity rate instead of the first-class rate in effect at the time the shipments moved. No testimony was intro-

duced before, received in evidence or in any way, manner or form considered by the Interstate Commerce Commission, bearing upon the subject or issue of damages or not in passing upon the charge of the defendant in error that the commodity rate was unjust and unreasonable.

The defendant in error in its petition before the Interstate Commerce Commission (Trans. 17, 23), did not plead or apply for damages in any sum, although it did pray for an order that the carriers be required to (Trans. 23) "pay to complainant by way of reparation for the unlawful charges hereinbefore described, the sum of \$1732.54, or such other sum as in view of the evidence to be adduced herein, the Commission may consider the complainant entitled to."

On the 14th day of August, 1914, the Commission made a supplemental order called,

AN ORDER AUTHORIZING REPARATION
(Trans. 29.)

This order recites:

"This case being at issue upon complaint and answer on file and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on February 3, 1914, made and filed a report containing its findings of fact and conclusions of law, which said report is hereby referred to and made a part hereof, and this case now coming on to be considered in regard to an application for reparation thereon, and it appearing that the parties have filed an agreed statement respecting the movement of the shipments involved * * * we find that complainant is entitled to an

6 *New York, New Haven & Hartford R. R. Co.*

award of reparation in the sum of \$828.13, with interest from January 1, 1913.”

The carriers having refused to comply with the order of reparation the defendant in error began an action under Section XVI of the Act to Regulate Commerce against The New York, New Haven & Hartford Railroad Company and other railroads above mentioned, to recover damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of a certain decision by such Commission, holding that the above named carriers violated the prohibition in Section 1 of that Act against unreasonable rates.

The petition contains three causes of action and relates to three separate and distinct trans-continental movements, which we, for convenience of statement, divide into three groups:

GROUP 1—CARRIERS INCLUDED.

The New York, New Haven & Hartford Railroad Company,

Boston & Albany Railroad Company,

The New York Central & Hudson River Railroad Company,

The Michigan Central Railroad Company,

Chicago & Northwestern Railway Company,

Union Pacific Railroad Company,

Oregon Short Line Railroad Company,

Oregon-Washington Railroad & Navigation Company.

RATE COLLECTED—Commodity rate of \$4.00 per hundred pounds.

RATE FOUND REASONABLE BY COMMISSION: First-class rate contemporaneously in effect.

(Note: Shipments aggregating 32,000 pounds under this order would take a rate of \$3.00 per hundred pounds, and shipments aggregating 46,700 pounds would take a rate of \$3.70 per hundred pounds.)

Excess of rate charged by carriers over rate found reasonable by Commission as applied to the shipments aggregate \$463.10.

GROUP 2—CARRIERS INCLUDED.

The New York, New Haven & Hartford Railroad Company,

Central New England Railway Company,

Erie Railroad Company,

Chicago & Erie Railroad Company,

The Chicago, Rock Island & Pacific Railway Company,

Union Pacific Railroad Company,

Oregon Short Line Railroad Company,

Oregon-Washington Railroad & Navigation Company.

RATE COLLECTED—Commodity Rate of \$4.00 per hundred pounds.

RATE FOUND REASONABLE BY COMMISSION: First-class rate contemporaneously in effect, to-wit: \$3.00 per hundred pounds.

Excess of rate charged by carriers over rate found reasonable by Commission as applied to the shipments, namely, 20,615 pounds, aggregates \$206.15.

8 *New York, New Haven & Hartford R. R. Co.*

GROUP 3—CARRIERS INCLUDED.

The New York, New Haven & Hartford Railroad Company,

Boston & Maine Railroad,

Canadian Pacific Railway Company,

The Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Spokane International Railway Company,

Oregon-Washington Railroad & Navigation Company.

RATE COLLECTED—Commodity rate of \$4.00 per hundred pounds.

RATE FOUND REASONABLE BY COMMISSION: First-class rate contemporaneously in effect, to-wit: \$3.00 per hundred pounds.

Excess of rate collected over rate found reasonable by Commission as applied to the shipment—15,888 pounds, aggregates \$158.88.

Section 14 of the Act to Regulate Commerce, first paragraph, provides:

“★ ★ ★ And in case damages are awarded, such report shall include the findings of fact on which the award is made.”

The Commission found that complainant,

“(b) Was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect.”

Now the Commission followed the pathway of one of two dilemmas; it either

(a) Measured the damages by computing the difference between the two rates, or

(b) Found a fact on an issue of damage or not without evidence to support it.

It is common knowledge that the Interstate Commerce Commission holds the view that it can award damages by way of reparation according to the measure indicated by the difference between the two rates, namely, the one overthrown and that fixed as a substitute therefor, without requiring the complainant to prove that he sustained any damage; it could happen that a claimant submitted proof showing a damage, the amount of which would equal "the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect." But in this case no such evidence nor any evidence was offered.

Defendant in error neither before the Interstate Commerce Commission nor before the District Court introduced testimony respecting the pecuniary loss sustained as a result of the carriers' alleged violation of the Act to Regulate Commerce, the recovery of which is permitted by Section 8 of that Act. Instead, however, they have alleged in paragraph 14 (Trans. 16), of the first cause of action, paragraph 7 of the second cause of action, and paragraph 10 of the third cause of action, that it has been damaged in a particular sum alleged,

"Being the difference between the amount actually charged and collected by the said respondents and paid by the said petitioner and the reasonable amount which the said petitioner would have paid based upon the said first-class rate at the time of said ship-

ment which should have been applied to motorcycles in car lots."

The carriers declined to pay on the ground:

NO DAMAGE SHOWN.

The carriers contended before the Interstate Commerce Commission (Trans. 168, cross-examination of Witness C. F. Wright, plaintiff in error, Exhibit 1, testimony before I. C. C.), when these rates were investigated, as they have contended before the lower court and still contend here, that the defendant in error was not damaged, has not been shown to be damaged, and that no testimony anywhere supports such issue or such finding.

Thereafter, the carriers having refused to comply with the order for the payment of money within the time limit, the defendant in error filed in the District Court of the United States for the District of Oregon, a petition "setting forth briefly the cause for which he claims damages and the order of the Commission in the premises." The carriers who were parties to the proceedings before the Interstate Commerce Commission were made parties to this proceeding; the interests of each being in common, only as indicated in Groups 1, 2 and 3 heretofore set out. A trial was had, the orders of the Interstate Commerce Commission of date February 3, 1914, and August 14, 1914, being admitted by the pleadings and the extent of the shipments made having been also admitted, the defendant in error rested its case.

Reliance was had upon that part of Section 16 as amended, of the Act to Regulate Commerce, which reads:

“On the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated.”

THE COURT OF APPEALS WILL PLEASE NOTE THAT THE ORDERS OF THE INTER-STATE COMMERCE COMMISSION DO NOT CONTAIN ANY FINDINGS OF FACT IN RELATION TO THE MEASURE, QUANTUM OR FACT OF DAMAGE AS DISTINGUISHED FROM THE INQUIRY INTO THE REASONABLENESS OF THE RATE.

The Carriers' Answer. The answer of the carriers, owing to the necessity of getting authority from so many legal departments of the defendant carriers, was somewhat illogically entered. Those for whom the respondents' attorneys of record had immediate authority, filed their answer on December 20, 1915 (Trans. 49). Later authority was secured from the balance of the plaintiffs in error and an appearance was entered for them on the 11th day of February, 1916 (Trans. 66), and these carriers adopted and made as their own the amended answer of the carriers who filed their appearance and answer on the 20th of December previously.

The petitioner in the court below desired to amend the petition to include Honorable J. M. Dickinson, receiver of The Chicago, Rock Island & Pacific Railway Company, and whereupon the plaintiffs in error desiring to file an amendment to the amended answer (Trans. 69), it was stipulated between the counsel (Trans. 103) that such amendment be filed with the Clerk and consid-

12 *New York, New Haven & Hartford R. R. Co.*

ered a part of the amended answer, without the formality of rewriting the same. By way of reference, these answers will be found in the transcript as follows:

Answer of Boston & Maine Railroad:

The Canadian Pacific Railway Company,
The Minneapolis, St. Paul & Sault Ste. Marie
Railway Company,
Spokane International Railway Company,
Oregon Short Line Railroad Company,
Union Pacific Railroad Company,
Oregon-Washington Railroad & Navigation
Company (Trans. 49),
The New York, New Haven & Hartford Rail-
road Company,
The New York Central & Hudson River Rail-
road Company,
The Michigan Central Railroad Company,
Erie Railroad Company,
Chicago & Erie Railroad Company,
Central New England Railway Company,
Chicago & Northwestern Railway Company,
The Chicago, Rock Island & Pacific Railway
Company, and

J. M. Dickinson, Receiver, and

Boston & Albany Railroad Company (Trans.
66).

Afterwards, on February 16, 1916, the re-

spondents filed a further and separate answer and defense to the three causes of action stated in petitioner's petition (Trans. 70).

DEMURRER TO ANSWER.

On February 17, 1916, a demurrer to the answer of the respondents and to the amendment to the amended answer heretofore mentioned, alleging as ground therefor that the same fails to state sufficient facts to constitute a defense or counterclaim or confession and avoidance of the causes of action, or either of them set forth in the petition herein (Trans. 72).

The argument of counsel and the ruling of the court upon this demurrer was suspended until after the testimony was taken. In the meantime defendant in error filed a reply (Trans. 75). After the testimony was taken, the court made and entered an order sustaining the demurrer to the answer of the carriers (Trans. 74), and directed the petitioner's counsel to prepare findings of fact and conclusions of law in plaintiff's favor (Trans. 80), after which there was entered on the 21st day of February, 1916, a judgment against the several groups of carriers for certain amounts therein set forth (Trans. 94).

At the time of the trial and at the close of the testimony, the carriers presented certain findings of fact and conclusions of law and requested the court to adopt, sign and file the same (Trans. 97). The Court refused to do so, after which a bill of exceptions containing all of the testimony taken before the Court and all of the pleadings before the Interstate Commerce Commission and

14 *New York, New Haven & Hartford R. R. Co.*

all facts investigated by the Interstate Commerce Commission based upon which, such Commission made the report in writing of February 3, 1914 (Trans. 24), and later the order of reparation made August 14, 1914 (Trans. 29).

The proof, as disclosed by the bill of exceptions, fully supported the carriers' answers. There was no conflict in the testimony.

DEFENDANT IN ERROR CONTENDS.

The petitioner, defendant in error, based its right of recovery upon the following propositions:

(a) It shipped certain carloads of motorcycles from Armory, Massachusetts, to Portland, Oregon, at certain times and paid a commodity rate of \$4.00 per hundred pounds.

(b) It petitioned the Interstate Commerce Commission to revise such rate, alleging the same to be unjust and unreasonable, in violation of Section 1 of the Act to Regulate Commerce, incidentally asking a reparation in a certain sum, neither having plead nor proved actual damage.

(c) The Interstate Commerce Commission made a report in writing, holding such rate unreasonable to the extent that it exceeded the first-class rate contemporaneously in effect, and found the complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect, which means, as alleged in the plaintiff's petition, paragraphs 14, 7 (Trans. 37) and 10 (Trans. 45) of the respective causes of action,

that the Interstate Commerce Commission measured the damage by using the difference between the amount actually charged and collected and the amount it would have paid at the rate fixed by the Commission as reasonable, amounting in money to the sum of \$828.13, with interest from January 1, 1913.

(d) That petitioner's case is made by showing the shipments moved and introducing the orders of the Interstate Commerce Commission just referred to, without additional testimony showing the amount of injury suffered or the resulting pecuniary loss inflicted.

THE CARRIERS CONTEND

1. Ballou & Wright, defendant in error, in respect to motorcycles is distributing agent of the manufacturer (Trans. 104).

2. They have a contract with Hendee Manufacturing Company of Armory, Massachusetts, whereby they become the exclusive distributing agents for the area, district or trade territory consisting of all of the State of Oregon and a part of the States of Washington and Idaho. All the motorcycles mentioned in the bill of complaint came from Armory, Massachusetts, and were purchased f. o. b. factory at Armory; the factory fixing a price at which they were to sell the machines, a catalogue price. Large quantities of catalogues were furnished and distributed to the public and the prices printed in those catalogues were the prices at which Ballou & Wright were allowed to and did sell all of the machines purchased and shipped (Trans. 106).

The gross price at factory to Ballou & Wright was always the list price published in the cata-

logue, available for public distribution (Trans. 107), and Ballou & Wright sold all of these motorcycles in turn with reference to this catalogue list price (Trans. 107), adding to the catalogue list price a sufficient sum to cover the freight, telling the customer in the course of the negotiation that this shipment was for the purpose of covering the freight, thereby intending and giving to the customer the factory price, f. o. b. Armory, Massachusetts, plus the freight.

4. Carriers admit the quantity of the shipments claimed and in turn have shown and contend that all of the motorcycles were sold and that none remained on hand, nor were any sold for less than the catalogue price, plus the freight.

5. Carriers further contend that by reason of the assessment and collection of the commodity rate of \$4.00, the defendant in error was deprived of no trade area nor was their district in which they were permitted to deal by their contract, limited or circumscribed. Their business was as large and their profits as substantial under one rate as another. They sold to their trade all the motorcycles bought and shipped and obviously could have done no more. Their competitors did likewise and no elements of discrimination or preference are present.

6. That no pecuniary loss has been proven to have been suffered by the defendant in error, and to support a recovery under Section 8 of the Act to Regulate Commerce, the only source and authority of the right to recovery, there must be a showing of some specific pecuniary injury, and that the mere fact of a violation of Section 1 of the Act to Regulate Commerce does not of itself create a cause of action.

7. That while the statute, Section 16, affords to the orders of the Interstate Commerce Commission *prima facie* effect, yet such order was made without any testimony to support it, and in the absence of such testimony, the Court will review the question of its validity, holding the same invalid, and, therefore, decline to afford it the evidentiary character given by the statute with the result that the judgment of the lower court becomes erroneous. Moreover, the *prima facie* effect of the Commission's order was fully overcome by the carriers' testimony including that offered as well as that admitted in evidence.

8. The lower court found difficulty in distinguishing between a straight overcharge and the situation arising where the carrier has assessed and collected a rate lawful and proper at the time the shipment moved, but which was subsequently determined to be unreasonable and excessive.

An overcharge arises where a carrier charges more than a published rate. The excess of such published rate is unlawfully exacted. The sum being exacted without a rate to base it upon, may be recovered back in an action for money had and received. Where, however, the carrier has assessed and collected a sum equal to the published rate on a given article, it has merely performed an obligatory act, for it is the duty of the shipper to pay and the carrier to retain such amount, and no court or commission may direct the return of the same, or any part thereof.

Should the Commission subsequently find such rate to be unreasonable and excessive, it may reduce the same to a sum reasonable and proper. The excess of the published rate over

the rate subsequently fixed as reasonable is not an overcharge.

The situation arising from the entire transaction of which such excess is but a part, merely amounts to a violation of Section 1 of the Act to Regulate Commerce, for the results of which damages followed recoverable when proven under Section 8 of said Act.

The lower court having found generally in plaintiff's favor, entered a judgment as prayed for. A writ of error was issued out of this court requiring the record to be filed for the purpose of review, and the case is now before the Circuit Court of Appeals for re-examination.

POINTS AND AUTHORITIES.

I.

The recovery in this action is allowed only by the provisions of Section VIII of the Act to Regulate Commerce. This section measures the recovery by creating a liability "for the full amount of damages sustained in consequence of such violation of the provisions of this act," and the right to recover is limited to the pecuniary loss suffered and proven.

Parsons v. Chicago & N. W. R. R. Co., 167 U. S. 447, 460.

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 206.

Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 429.

II.

The following sections of the Act to Regulate Commerce are material to the consideration of this case:

Section 1 of the Act requires all charges in respect to transportation to be just and reasonable, prohibiting and declaring unlawful every unjust and unreasonable charge.

Section VIII creates a liability "to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provision of this act," etc.

Section XIII authorizes complaints to the Interstate Commerce Commission and inquiries and investigations to be made.

Section XIV requires the Commission after investigation "to make a report in writing in respect thereto * * * and in case damages are awarded such report shall include the findings of fact on which the award is made."

Section XVI authorizes the Commission, if it shall find any party "is entitled to an award of damages under the provisions of this Act for a violation thereof," to make an order directing the carrier to pay such sum.

The section further authorizes a proceeding to recover such damages in the District Court of the United States, such proceeding to take the course as other civil suits for damages, "except that on the trial of such suit, the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

Fuller. The Act to Regulate Commerce construed by the Supreme Court, 58, 304, 362, 366, 410.

III.

An order of the Interstate Commerce Commission authorizing reparation is not within the statute unless the term "entitled to an award of reparation" as used in the order, is construed to mean "an award of damage." This probably is the meaning.

Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, 481.

IV.

A finding by the Interstate Commerce Commission contrary to the undisputed character of the evidence is void.

I. C. C. v. Louisville & Nashville R. R. Co., 227 U. S. 88.

I. C. C. v. B. & O. S. W. R. R., 226 U. S. 14.

Atlantic Coast Line v. No. Carolina Corp. Com., 206 U. S. 20.

Southern Pacific v. I. C. C., 219 U. S. 433.

A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must be set aside.

I. C. C. v. L. & N. R. R. Co., 227 U. S. 88, 92.

V.

While the Court will not review the Commission's finding of fact by passing upon the credibility of witnesses or conflicts in the testimony, nevertheless the legal effect of evidence is a

question of law and a finding without evidence is beyond the power of the Commission.

I. C. C. v. L. & N. R. R. Co., 227 U. S. 88, 92.

Florida East Coast Ry. Co. v. U. S., 234 U. S. 167, 185.

VI.

The question of the amount of the damages to be awarded by the Commission was to be determined from the evidence, and in the absence of a showing to the contrary, it will be presumed the findings were justified by the evidence. But it having been shown that there was no evidence to support the findings, the question is then justiciable and becomes one of law which the Court will review.

Meeker & Co. v. Lehigh Valley R. R. Co.,
236 U. S. 412, 430.

VII.

A carrier can only charge the published rate for the same article, and when collected cannot pay back any part thereof under any pretense however equitable to any shipper or every shipper.

Pennsylvania R. R. Co. v. Int. Coal M. Co.,
230 U. S. 184, 196.

If as a fact the rates were unreasonable, the shipper was nevertheless bound to pay, and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation, that is, for damages

22 *New York, New Haven & Hartford R. R. Co.*

under Section VIII of the Act to Regulate Commerce.

Pennsylvania R. R. Co. v. Int. Coal M. Co.,
230 U. S. 184, 197.

Reparation means to pay damages.

Mills v. Lehigh Valley R. R. Co., 238 U. S.
473, 481.

Reparation means, indemnification for loss or damage; satisfaction for any injury; amends.

Southern Pacific Co. v. Gold Valley Cons. Milling Co., 220 Fed. 14, 20.

See,

Cent. Dict. & Encyc., Tit.: Reparation.

It does not mean that the carrier should return to the shipper the excess of the published rate over the rate fixed by the Commission, even with the Commission's authority, for the Commission is limited to an award of damages which may or may not equal such excess.

VIII.

The Commission has uniformly applied the rule to discrimination cases and unreasonably excessive rate cases, that the damage recoverable under Section VIII was the difference between the published rate paid by the complaining shipper and the lower rate fixed by the Commission, or that given by the carrier to a more favored shipper.

Barnes Interstate Transportation, Sec. 428,
Par. C.

Burgess Cases, 13 I. C. C. Rep. 668, 680.

Wallingford v. A. T. & S. F., 30 I. C. C. Rep. 19, 21.

Hoover, etc. v. C. H. & D. Ry. Co., 31 I. C. C. Rep. 550, 552.

Cudahay Packing Co. v. A. T. & S. F. Ry. Co., 32 I. C. C. 560, 563.

Omaha Grain Exchange v. Chicago & Alton Ry. Co., 32 I. C. C. Rep. 597, 600.

DuPont, DeNemours Powder Co. v. L. & N. Ry. Co., 33 I. C. C. Rep. 288, 290.

It is now held in discrimination cases that the damages are not necessarily measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper, but may be more or less than such difference, but that whatever they are, they must be proven.

Pennsylvania R. R. Co. v. Int. Coal Co., 230 U. S. 184, 203.

IX.

Since the decision in the *Pennsylvania Railroad v. International Coal Mining Co.*, 230 U. S. 184, 203, the Interstate Commerce Commission has found no difficulty in applying the rule that no recovery can be had in discrimination cases without proof of actual pecuniary loss.

New Orleans Board of Trade v. Ill. Cent. Ry. Co., 29 I. C. C. Rep. 32.

Speigle v. Southern R. R. Co., 32 I. C. C. Rep. 687.

But the Commission in unreasonable and excessive rate cases has adhered to the doctrine that a shipper may recover the difference between the rate paid and what would have been a reasonable rate at the time the shipment moved,—the Commission fixing the amount of such potentially reasonable rate.

Ballou & Wright v. N. Y., N. H. & H. R. R. Co., et al, 34 I. C. C. Rep. 120.

X.

In an endeavor to follow the previous ruling of the Interstate Commerce Commission, a certain course of reasoning has been undertaken, having for its purpose to distinguish between discrimination cases and cases charging an excessive and unreasonable rate, but it is submitted that such reasoning is illogical and erroneous.

Darnell-Taenzer Lbr. Co. v. Southern Pacific, 221 Fed. Rep. 890, 894.

ARGUMENT.

The sole question for decision in this case is:

What is the measure of the damage recoverable under Section VIII of the Act to Regulate Commerce, in cases arising out of the violation of Section 1 of the Act, which requires all charges in respect to transportation to be just and reasonable and which prohibits unjust and unreasonable charges?

The plaintiffs in error contend that the recovery in this proceeding is allowed only by the provisions of Section VIII of the Act to Regulate

Commerce. This Act declares the common carrier "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act," etc.

There is no special provision fixing a different measure of recovery for each of the three general commands of the Act to Regulate Commerce, that is to say, there does not exist a certain measure of damage for the violation of Section 1 of the Act, another and different measure for the violation of Section 11 and a third and still different measure for the violation of Section 111. For each violation, Section VIII permits the recovery "for the full amount of damages sustained."

In the case of

Parsons v. Chicago & N. W. R. R. Co., 167
U. S. 447,

at page 460, the Supreme Court of the United States said:

"The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

The Supreme Court in this case was discussing the recovery permitted by and the limitations contained in Section VIII of the Act, and in fur-

ther consideration of the causes of action created by this section, the Court in the case of

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, at p. 206,

further remarked:

“This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons case, and is the view taken in the only other cases we find in which this question, under the Act to Regulate Commerce, has been construed.”

The case referred to was that of

Knudsen v. Mich. Cent. R. R., 148 Fed. 968, 974,

wherein the Circuit Court of Appeals for the Eighth Circuit remarked that,

“To support a recovery under this section, there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the Commission.”

The rule announced in the Parsons case was further adhered to in the case of

Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 429.

The Parsons case involved a violation of Section 2 of the Act. It was a discrimination case.

The petitioner seeks to distinguish between the rule in discrimination cases from that in unreasonably excessive rate cases. It is notably true that the reasoning which has lead the Interstate Commerce Commission to measure the damage in both sorts of cases by taking the difference between the two rates prior to the decision of the Supreme Court in the Parsons case, has been abandoned only in discrimination cases, and is still adhered to in cases such as the one at bar, notwithstanding that Section VIII of the Act to Regulate Commerce makes no distinction between the same.

The case of *Burgiss v. Transcontinental Freight Bureau*, 13 I. C. C. Rep. 668, 680, is the leading case of the Interstate Commerce Commission upon the subject. We quote:

“It is impossible to say, therefore, to what extent these complainants may have been actually damaged by the advance in this rate, if the word ‘damage’ is to be interpreted and applied as claimed by the defendants.

Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay.”

The foregoing principle was adopted by the lower court. The plaintiffs in error dispute such to be the proper measure.

The reasoning which induced the Commission to adopt the foregoing measure does not appear to be sound. It certainly does not follow that because it was impossible to say what the actual damages were, or in other words, because it was impossible to find from the proof the "full amount of damages sustained" that the Commission would be thereby justified in arbitrarily fixing some other measure of damage, unsupported by testimony and unfounded in law. The Commission said at page 680:

"If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported."

It is very respectfully submitted that no instance can be found within the books from the earliest commentator to the latest opinion of the Federal Supreme Court, justifying an arbitrary finding of damage, because the plaintiff or claimant finds himself in a position where it is impossible for him to show himself to have been actually damaged. This reasoning had its effect upon the Circuit Court of Appeals for the Sixth Circuit in the case of

The learned judge speaking for the Court in this case, recognizing that the plaintiff had not proven actual pecuniary damage, justified it being awarded, in the following words, at page 894:

“In our judgment, a rule requiring the shipper to mathematically demonstrate that it was actually pecuniarily damaged in the amount of the unreasonable excess in rates so paid would effectually emasculate the reparation provision of the Interstate Commerce Act.”

The Court in following the lead of the Commission rather than that of the Supreme Court of the United States, gave as an additional reason the fact that although the Supreme Court in the Meeker case reaffirmed the rule that damages in reparation cases must be proved, yet it is said the Court did not pass directly upon the proposition involved in the Burgess case and in the instant case, and because the court found nothing in the International Coal Company case nor the Meeker case conflicting with the view that damages resulted from the imposition of unreasonably excessive rates are normally measured by the difference between the rate charged and a reasonable rate, the court believed the Burgess holding correct.

The Court further said at page 894:

“Cases of excessive and unreasonable rate differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an

excessive and unreasonable rate is *ipso facto* unlawful."

It cannot be true that the charging of an excessive and unlawful rate is *ipso facto* unlawful, provided such rate was duly filed with the Interstate Commerce Commission as required by law. If, as a fact the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation, that is, for damages under Section VIII of the Act to Regulate Commerce.

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 197.

Neither is it true that to require damages to be proven would effectually emasculate the reparation provisions of the Interstate Commerce Act, for common justice required proof of the "full amount of damages sustained in consequence of any such violation of the provisions of this Act," before a judgment of recovery can be allowed. Moreover, the Supreme Court of the United States in expressing its surprise at the claim that impossibility of proof was a reason for recovery, used the following language, 230 U. S. 200:

"It is said, however, that it is impossible to prove the damage occasioned to one shipper by the payment of rebates to another, and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy, but deprives the plaintiff of a right it had at common law to re-

cover this difference between the lawful and unlawful rate. We are cited to no authority which shows that there was any such ancient measure of damages and no case has been found in which damages were awarded for such discrimination."

Surely, therefore, if the shipper was unable on account of sheer impossibility to prove damages in discrimination cases, why should a judgment be awarded with any greater facility when the shipper finds himself unable, by reason of impossibility, to prove damages in excessive rate cases. There was no such ancient measure of damages. Section VIII of the Act to Regulate Commerce permits recovery only for the full amount of damages sustained. The Supreme Court in the Parsons case, holds these damages must be proven antecedent to recovery. Nor can they be recovered without proof of what pecuniary loss had been suffered. The fact is that the Interstate Commerce Commission as well as the Court following its lead, have misapprehended the meaning of the term "reparation." As a matter of fact, there is no such thing under the Act to Regulate Commerce as reparation in the sense of returning the excessive portion of a collected rate. Reparation does not mean returning the rate or some part thereof. Reparation means to pay damages.

Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, 481.

When the Commission made the award as reparation, they made a finding of damage. "No other intelligent construction can be put upon their statement." The Commission found

(Trans. 27) that Messrs. Ballou & Wright were "Therefore, entitled to an award of reparation." They said further, however (Trans. 27), "On this record, however, the amount of reparation cannot be determined." If the Commission did not mean to say that petitioner was entitled to "an award of damage" no other intelligent construction can be put upon their statement.

Mills v. Lehigh Valley R. R. Co., 238 U. S. 473, 481.

Therefore, to award reparation means to award damages. Reparation means, indemnification for loss or damage; satisfaction for any injury; amends.

Southern Pacific Co. v. Gold Valley Cons. Milling Co., 220 Fed. 14, 20.

See,

Cent. Dict. & Encyc., Title "Reparation."

Now, therefore, if a reparation and damage are equivalent terms, then we have a case where the Commission has expressly found that they could not determine the amount of reparation upon the record before them.

This record is before the Court as an exhibit (Trans. 141, 161). Under the Commission's own finding, the defendant in error never did make adequate proof of damage, because no further evidence on the subject of damage was offered. The only thing subsequently done was the filing of a statement concerning the shipments, showing the date of removal, point of origin, point of destination, route, weight, car number and initial, rate applied and charges collected, and there never was any dispute concerning these facts.

No testimony concerning the commercial effect of the rate upon the carrier's business was introduced and no further or other evidence was taken before the Commission than that shown in the transcript in this case, respondent's exhibit "1" (Trans. 161) referred to by the Commission (Trans. 27) as being insufficient upon which to determine the amount of reparation.

Moreover, reparation does not mean that the carriers should return to the shipper the excess of the published rate over the rate found reasonable by the Commission, even with the Commission's authority, for the Commission is limited to an award of damages which may or may not equal such excess. It would be a marvelous coincidence if such damage when proved did equal the excess, and it is certainly an event so unlikely to happen as to be unworthy of a place in the reasoning of the Court. Yet, nevertheless the Supreme Court of the United States in the

International Coal Company case, 230 U. S. quoted at page 429, Vol. 236 of the United States Supreme Court Reports in the *Meeker & Company* cases, recognized the possibility that the damages might be the same as such excess, or less or many times greater than such excess, but we contend that whatever they were, greater or lesser, than such excess, unless they were proved, could not be recovered. But it is further claimed in the

Darnell-Taenzer Lumber Co. case, 221 Fed. 894,

that the payment by the shipper of excessive and unreasonable freight charges naturally imports legal damage to the shipper therefrom.

Why? If so, how much, to what extent? It certainly does not follow that because Section 1 of the Act to Regulate Commerce was violated that mere proof thereof is sufficient to justify recovery.

It was said by the Circuit Court of Appeals for the Eighth Circuit in the case of

Knudesen v. Michigan Central R. R. Co.,

148 Fed. Rep. 968, 974,

“To support a recovery under this section (8) there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government, or to corrective or coercive proceedings at the instance of the Commission.”

This was approved by the Supreme Court of the United States in the International Coal Company case, 230 U. S. 207. Therefore, without more, the payment by the shipper of excessive and unreasonable freight charges, imports nothing more than a nominal damage at the most. It is a strange doctrine, somewhat anomalous and remarkable, which penalizes a carrier by requiring it to return to a shipper the excess portion of a duly published, filed and approved rate which it has collected from the shipper, over and above a rate which the Interstate Commerce Commission has decided to be reasonable. We say strange, anomalous and remarkable, for surely the carrier is presumed to have intended to fix a reasonable rate in the first instance. That is, it is presumed to be not guilty of the vio-

lation of law. It filed and published a rate. The shipper was bound to pay and the carrier bound to retain that rate.

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 194, 197.

The rate, therefore, was the lawful rate, and it continued to be lawful until the Interstate Commerce Commission decided that it was unlawful, in that it was excessive. Henceforth it was unlawful, and while the charging of an excessive and unlawful rate will be *ipso facto* unlawful when the fact of unreasonableness is adjudicated, yet it is submitted that the charging of a rate once approved and filed with the Commission and which becomes a rate which the shipper is bound to pay and the carrier to retain, is not *ipso facto* unlawful *ab initio*. The anomaly at once appears in the proposition that a rate disapproved by the Commission as being too high is *ipso facto* unlawful, and yet until it has been so disapproved, the shipper is bound to pay it and the carrier to retain it. Such reasoning falls short of that degree of logical soundness as to at once cease to be valid. Moreover, it is not true that

“If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them.”

If that were true, what rule of decency or justice would desire to give damages. If damages could not be shown with sufficient accuracy, why should a claimant be entitled to dam-

ages. We say it is not true that the rule would exclude recovery if there was actual damage. The record in this case shows the plaintiffs in error to have actually "traced out the exact commercial effect of the freight rate paid." The rate did not reduce the area of its business activities. Ballou & Wright was not prevented from selling the motorcycles shipped. All were sold. Ballou & Wright purchased the motorcycles f. o. b. Armory, Massachusetts, and sold them in the territory granted to them by their contract with the manufacturer f. o. b. Armory, Massachusetts. How did they do this? They computed the freight rate and in each and every instance added it to the factory price and the customer or purchaser paid it. This is exactly the same as if they had bought and sold f. o. b. Armory, Massachusetts. The profit arising from the business of distributing motorcycles was as great to Messrs. Ballou & Wright under one rate as the other. By this means we have traced out the exact commercial effect of the freight rate paid.

But it is contended that the defendant in error has proven its case by the introduction of the report of the Commission (Trans. 25) and the order authorizing reparation (Trans. 29); that this order, by virtue of Section 16 of the Act to Regulate Commerce, is *prima facie* evidence of the facts therein stated. That the *prima facie* effect of this order was not overcome.

The Court will bear in mind that absolutely no evidence of damage other than this order was introduced; moreover, the Commission itself declared the record to be insufficient to justify an award of reparation, i. e., of damage.

The case, therefore, differs from the Darnell-

Taenzer case in that there was before the Commission as well as before the Court other evidentiary considerations, and we are certainly justified in assuming that if such other evidentiary considerations were not present in that case the Court might have arrived at a different conclusion.

We quote from the opinion at page 894:

“We, therefore, think it clear that the Commission’s statement that the excessive freight rate had been added to the price paid by the customer did not, as a matter of law and *in view of the other considerations referred to by the Commission*, overcome the *prima facie* effect of the findings that plaintiffs were damaged to the extent of such excessive freight rate actually paid by them.”

The other consideration referred to by the Commission was the following reported in the margin at page 892, 221 Fed.:

“It appeared that one witness suspended operations on the Pacific Coast owing to the advance in rates, and other witnesses were of the opinion that more lumber would have been sold under the seventy-five cent rate.”

Such, or similar considerations are entirely absent from this case. On the other hand, the testimony is conclusive that Ballou & Wright’s motorcycle business was not limited or circumscribed in the slightest degree. All motorcycles bought and shipped were sold, and they were substantially bought and sold f. o. b. Armory, Massachusetts, and that the effect of buying the motorcycles, shipping them to Portland and selling them again for factory price, plus freight,

is substantially buying f. o. b. point of shipment.

The lower court erroneously adopted the view, as did also the Interstate Commerce Commission in finding Ballou & Wright injured by the mere fact of paying the commodity rate of four dollars when the first class rate of three dollars was decided to be reasonable. The effect of the transaction upon the business of the shipper, injuriously or otherwise, is the proximate cause of the damage. If the payment of excessive rate has no effect upon that business, obviously damages do not result.

Ballou & Wright are engaged in the business, among other forms, of distributing to the trade in circumscribed areas of the motorcycles manufactured at Armory, Massachusetts. It is a business contemplating both buying and selling. The business is not interfered with merely by the freight rate paid. It is not lessened; it has gone on just the same. The commercial activities of Messrs. Ballou & Wright has proceeded in the same channel, with the same profitable results under one rate as the other. The commercial effect of the \$4.00 commodity rate was absolutely nil in comparison with the commercial effect of the first-class rate contemporaneously in effect. It would be adopting a too narrow view to refuse to consider this unchanged, unlimited and uncircumscribed commercial activity and cling only to the proposition that because a shipper has paid \$4.00 for the carriage of 100 pounds when he should have paid \$3.00 for such carriage that he is thereby damaged in the sum of \$1.00, for it is obvious that when the commercial effect of the freight rate is traced that he is not damaged in such sum.

The tendency of the Interstate Commerce Commission in the light of their decisions was to find:

1st. That the carrier had received some funds which it was not entitled to for the particular service rendered.

2nd. And it ought to make reparation to somebody, and

3rd. The Commission believed that it should return the money to the extent of the excess.

Now, the authority of law for such procedure did not exist, for the Commission has no authority to so declare. Its authority is found in Section XIV of the Act to Regulate Commerce, which authorizes an investigation to be made and a report in writing in respect thereto, and "in case damages are awarded, such report shall include the findings of fact on which the award is made."

Now, if the carrier does not pay the amount of this award of damages, then action may be had under Section XVI of the Act.

The plaintiff in error did not attempt independently of the orders of the Interstate Commerce Commission to establish "the full amount of damage sustained" recoverable under Section VIII of the Act.

We do not dispute that by the introduction of this order, together with proof of the fact of shipment, that a *prima facie* case was made, but this *prima facie* case is overthrown by the testimony of plaintiffs in error. This testimony is of two parts:

1st. All of the pleadings filed with and the testimony taken before the Interstate Commerce

Commission, out of which came the orders sued upon is in evidence. (Trans. pp. 141, 161.)

Secondly. Direct testimony tracing out the exact commercial effect of the freight rate paid is in evidence, establishing that the payment of the commodity rate of \$4.00 had no appreciable or other effect whatever upon the commercial activities and business of the defendant in error.

This meets and overthrows the *prima facie* effect of the orders of the Interstate Commerce Commission.

But it may be contended that the Interstate Commerce Commission in the case at bar did not measure the damage by computing the difference between the two rates. The words of the finding are (Trans. 27):

“We further find that complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first class rate contemporaneously in effect.”

It may be claimed that the finding is not that complainant was damaged in a sum measured by the difference between the two amounts or a sum, being the amount of difference between the two rates multiplied by the number of hundred weight shipped, but that the finding of damage was based upon some other testimony which showed the petitioner's damage in the aggregate to be equal or co-extensive with a sum so measured or computed.

This distinction was noticed by the Supreme Court of the United States in the case of *Meeker & Co. v. Lehigh Valley R. R. Co.*, 236 U. S. 412, 429.

Of course, it is common knowledge in the first place, and in the second place absolutely shown by this record, that the Interstate Commerce Commission in the case at bar did measure the damage by taking the difference between the two rates and multiplying by the number of hundred pounds shipped. That proposition is absolutely proven by the pleadings in the case and will not be gainsaid. (See paragraphs 14, Trans. 16; 7, Trans. 37 and 10, Trans. 45 of the petition.) Yet where an order contains language that the shipper was "damaged to the extent of the difference" it might be claimed that the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss.

This was the view of the Supreme Court of the United States in the Meeker & Co. case, 236 U. S. 429, wherein the court said:

"And in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being *no showing to the contrary*, that they were justified by it."

A reading of the opinion in the Meeker case justifies the conclusion that if the evidence before the Interstate Commerce Commission had been before the Court and it had been determined as it has been in this case, that the Interstate Commerce Commission did not undertake to make a finding respecting the claimant's actual pecuniary loss by tracing the commercial effect of the Freight rate upon the business activities of the shipper, but instead were content to subtract the rate found reasonable from the rate determined unreasonable, that such method of ascertaining "the full amount of damages sus-

tained" under Section VIII of the Act to Regulate Commerce would have been disapproved.

The case at bar differs from the Meeker case in that all the evidence taken before the Interstate Commerce Commission is now before the Court and *is a showing to the contrary*, within the meaning of the opinion in the Meeker cases. Therefore, it cannot be presumed that the finding of the Interstate Commerce Commission was based upon the evidence adduced. As a matter of fact no evidence was adduced before the Interstate Commerce Commission bearing upon proving or tending to prove damage. The claimant did not proceed upon the theory that it was compelled or required to prove damage. It did not allege damage. It proceeded upon the theory that the measure of the damage was the difference between these two rates. Therefore, in the absence of evidence upon which to base an award of damage, the order of the Interstate Commerce Commission in that respect is void.

It has become fundamental in this department of American jurisprudence that a finding of the Interstate Commerce Commission without evidence is beyond the power of the Commission, and an award based thereon is contrary to law and must be set aside. Such finding without evidence is arbitrary and baseless. It would mean that where rights dependent upon facts the Commission could destroy all rules of evidence and capriciously make their finding by administrative fiat.

"Such authority, however beneficently exercised in one case," says the Supreme Court of the United States, "could be inju-

riously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

Int. Com. Comm. v. Louis. & Nash. R. R.,
227 U. S. 88, 91.

Or if the facts found do not as a matter of law support the order made, it is void.

We are aware that the courts will not review the Commission's findings of fact by passing on the credibility of witnesses, or conflicts in the testimony, but nevertheless the legal effect of evidence is a question of law and a finding without evidence to support it is beyond the power of the Commission.

Int. Com. Comm. v. Louis. & Nash. R. R.,
227 U. S. 88, 92.

Florida East Coast R. R. Co. v. U. S., 234
U. S. 167, 185.

Under those circumstances such question involves not an issue of fact, but one of law which it is the duty of the court to examine and decide.

Florida East Coast R. R. v. U. S., 234 U. S.
167, 185.

The pleadings before the Interstate Commerce Commission are reported at page 141 of the transcript. The testimony, and the whole thereof taken before the Interstate Commerce Commission is reported at page 161, *et seq.* of the transcript.

The testimony before the Interstate Commerce Commission (Trans. 168) disclosed that Mr. Wright, of Ballou & Wright, added \$15 to

the list price for the purpose of covering the freight and which was from 60 cents to \$3.00 more than the total amount of such charges. This amount included all handling charges, as well. (Trans. 169.) A motorcycle which retails for \$250 at Armory, Massachusetts, Messrs. Ballou & Wright retail for \$265. (Trans. 170.)

Mr. W. J. Fink (Trans. 103) testified concerning the circumstances under which motorcycles were bought and sold, from which it appeared that the manufacturer distributed large number of catalogues whereby the public was advised of the list price, or to say the retail price, f. o. b. factory, Armory, Massachusetts, of motorcycles, and the distributors on the West coast used this factory price as a basis of their commercial activities in motorcycles, selling all machines purchased at list price, plus freight. (Trans. 108.) In other words, the testimony before the Interstate Commerce Commission, as well as the testimony before the Court, conclusively showed that Messrs. Ballou & Wright bought and sold motorcycles, f. o. b. factory, Armory, Massachusetts. Of course, they advanced the freight and they were out the use of this money until the motorcycles were fully distributed. Just how long they were deprived of the use of their money the evidence does not disclose, but it is obviously very clear that, if it be the duty of the court in ascertaining the "full amount of damages sustained" the recovery of which is authorized by Section VIII of the Act to Regulate Commerce, to measure the commercial effect which the assessment of a commodity rate in place of the first class rate had upon the business activities of the defendant in error, then such effect would not consist in

returning to them the excess above the reasonable rate when the commercial activities of the defendant in error were such that such excess was not lost to them, but it would merely consist in allowing to defendant in error an amount by way of damage equal to the interest at the legal rate upon such excess charges *from* the time they were advanced to cover the freight bills incident to the shipment *to* the time when the motorcycles were distributed and the freight advancements returned in the ordinary course of the commercial and business activities of the defendant in error.

The evidence is not sufficient to enable the court to make a finding upon this point. Therefore, the court cannot make the finding. The evidence discloses no attempt upon the part of Messrs. Ballou & Wright to prove a damage before the Interstate Commerce Commission. They made no attempt to prove such damage before the lower court, save and except to avail themselves of the statutory effect of the orders of the Interstate Commerce Commission.

We have shown that the Commission had no testimony upon which to base a finding of damage. We have shown that they adopted the method of taking the difference between the two rates and multiplying the difference by the number of hundred pounds shipped in finding the damage.

Although the Interstate Commerce Commission has said in its order "That complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect," and although the Supreme

Court of the United States in the case of *Meeker & Co. v. Lehigh Valley R. R. Co.*, 236 U. S. 429, perceived in the words "damaged to the extent of the difference" between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable, nothing pointing to the application of an erroneous or inadmissible measure of damages in the absence of evidence showing the facts upon which the Interstate Commerce Commission acted, yet the record in the case at bar fully shows that the Commission had no testimony of any kind showing damage before it. But the testimony did show the contrary. It had evidence showing or tending to show that no pecuniary loss resulted from the transaction complained of. It had no testimony showing the character of damage, which Section VIII of the Act to Regulate Commerce authorizes to be recovered. All the Commission had before it was:

- (a) Total number of hundred pounds shipped;
- (b) The rate collected;
- (c) The rate found reasonable;
- (d) The difference;
- (e) The total in dollars ascertained by multiplying the quantity shipped by the difference between the two rates.

With this computation before the Commission, they have made a finding,

"That complainant was damaged in an amount equal to the difference between the amount collected and the amount it would have paid at the first-class rate contemporaneously in effect."

Now, the Interstate Commerce Commission has either adopted as the measure of the damage the difference between those two rates, or it convicts itself of intellectual dishonesty in reciting that the damage was "equal to the difference," without having any other testimony before it as a basis upon which to rest the conclusion or ultimate fact that such damage sustained did as a matter of fact equal the difference between those two rates.

The Supreme Court of the United States in the Meeker case at page 429, in speaking of the testimony said:

"If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other the claimant was entitled to an award upon that basis."

Theoretically this is true, but practically there wouldn't be one case in a million where the damages proven would actually correspond with this difference, and from a practical viewpoint the remark of the Supreme Court is not true.

And because the railroad company in the Meeker cases did not introduce in the court below the evidence upon which the Commission acted, the Supreme Court presumed that the findings of the Commission were justified by the evidence, and the coincidence of the damages corresponding to the rebate in one instance and to the overcharge in the other was regarded and presumed as having been the subject of sufficient proof, and, for those reasons, the finding of the Commission was upheld. Being upheld it becomes by virtue of Section XVI of the Act

to Regulate Commerce *prima facie* evidence that Meeker & Company were damaged as found.

The case at bar is different. The testimony before the Interstate Commerce Commission is in evidence. It shows that no evidence was introduced by claimants bearing upon the question of damage. The finding of the Interstate Commerce Commission many times heretofore quoted is not based upon any evidence.

The Court in reviewing this question of law thereby presented, must necessarily hold the order void for the want of evidence to support it. Being void, the order has no *prima facie* evidentiary effect.

The record of the trial in the court below, admissions, stipulations and testimony included, together with the testimony offered by plaintiffs in error and excluded by the court, positively and absolutely disclose defendant in error to have suffered no damage. If it be true that the assessment and collection of an excessive and unreasonable rate imports legal damage to the shipper therefrom, as was indicated in the Darnell Taenzer case, it can only be true that such acts would import nominal damages. It certainly could not import actual damage, for there is no measure of its extent.

The question involved in this case has been a live one before the Interstate Commerce Commission for some time. The carriers have uniformly contended that Section VIII of the Act to Regulate Commerce was not being given in respect to the measure of recovery, the correct construction. It has now been demonstrated that the construction given in respect to the measure of damage in discrimination cases by

the Interstate Commerce Commission was erroneous.

Pennsylvania Railroad Company v. Int. Coal Co., supra.

In a companion case with the one at bar,

Ballou & Wright v. N. Y. Etc. R. R. Co. et tls,
34 I. C. C. 120,

the Interstate Commerce Commission has squarely grounded its finding in respect to damage upon the doctrine that the measure of the damage is the difference between the rate collected and the rate fixed by the Commission as reasonable.

The Commission still thinks as was stated in *Michigan Hardwood Mfg. Co. v. Bureau*, 27 I. C. C. 32, that,

“If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them.”

This was the view of the Commission in discrimination cases, but it was erroneous; the correct view being that the commercial effect of the freight rate paid should be traced and if as a result damages were found to exist, judgment of recovery followed, but if as a result damages with sufficient accuracy had not been shown then no recovery followed.

Plaintiffs in error submit that such view is also erroneous in unreasonable and excessive rate cases. No ancient measure or standard of damage was ever based upon the inability of the claimant to prove his case.

Thus far we have discussed the general question involved without specific reference to the assignments of error. These assignments are necessarily numerous, but the precise question involved is centered upon the court's first conclusion of law, which reads as follows (Abstract, Trans. 129):

"That the measure of damages to petitioner herein is the difference between the amount collected by the said respective respondents and paid by the said petitioner on the said respective shipments, and the amount the petitioner would have paid at the said first class rate in effect at the time the said respective shipments moved."

The plaintiffs in error objected to this conclusion as being an erroneous view of the law, and requested the court to find in lieu thereof the following:

"That the measure of damages in this case is not the difference between the rate charged by the respondents for the shipments complained of in the complaint and the sum which the petitioner would have paid had the rate been assessed in the amount fixed by the Interstate Commerce Commission as reasonable."

The finding adopted by the Court was further objected to upon the ground that "It does not state a proper conclusion of law as to the measure of damage (Trans. 129).

Plaintiffs in error presented to the Court (Trans. 132) a series of findings of fact and conclusions of law, which they requested the court to adopt and sign; the ultimate effect of which requests was that the commercial effect of the

collection of the commodity rate upon the business activities of the defendant in error as shown by the evidence was of no moment. That there was no evidence introduced respecting damages, such as loss of profits on sales in competitive territory. That there was no competitive territory from which Messrs. Ballou & Wright were excluded. That no data was before the Court upon which to ascertain the damage, and in short, no damage was shown (Abstract 136, 137). (See Assignments of Error Nos. 14, Abstract 201; 22, Abstract 205; 25, Abstract 206, and 26, Abstract 207.)

These assignments of error all center upon the single proposition that the rule laid down by the Supreme Court of the United States in the International Coal Company case concerning the measure of damage, that damages must be proven; that the damages recoverable are separate and apart from any computation or difference between rates; that in ascertaining the damage, evidence relevant to the allegation of injury alone should be considered, and in short, that the rule in excessive and unreasonable rate cases concerning the recovery of damages is precisely the same as it is in the so-called discrimination cases.

That Section VIII of the Act to Regulate Commerce authorizing recovery of "the full amount of damages sustained in consequence of any such violation of the provisions of this act," has only one construction equally applicable to all sorts of recovery undertaken by virtue thereof, and that it is not to have an accommodation construction, that is, a construction differing for each particular case that comes before the Com-

mission. It follows, as a conclusion, the premises considered, that the judgment of the lower court is erroneous and should be reversed.

Respectfully submitted,

H. A. SCANDRETT,

ARTHUR C. SPENCER,

CHARLES E. COCHRAN,

Attorneys for Plaintiffs in Error.

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

The New York, New Haven & Hartford Railroad Company, a corporation; Boston & Maine Railroad, a corporation; Central New England Railway Company, a corporation; The New York Central & Hudson River Railroad Company, a corporation; The Michigan Central Railroad Company, a corporation; Erie Railroad Company, a corporation; Chicago & Erie Railroad Company, a corporation; The Canadian Pacific Railway Company, a corporation; The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation; Spokane International Railway Company, a corporation; Chicago & Northwestern Railway Company, a corporation; The Chicago, Rock Island & Pacific Railway Company, a corporation, and J. M. Dickinson, as Receiver thereof; Boston & Albany Railroad Company, a corporation; Union Pacific Railroad Company, a corporation; Oregon Short Line Railroad Company, a corporation; Oregon-Washington Railroad & Navigation Company, a corporation, *Plaintiffs in Error,*

vs.

Ballou & Wright, a corporation,
Defendant in Error.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR

*Upon Writ of Error to the District Court of the
United States for the District of Oregon*

SUBJECT INDEX

	Page
Statement	2
Contentions of Carriers	7
Contentions of Ballou & Wright	7
Points and Authorities	9
Argument	33
Point I. In an action at law tried to the court, findings on facts have the same effect as a verdict of a jury, and are conclusive on appeal unless there is no evidence to support them; and the court's refusal to find other facts is as conclusive on appeal as its findings. Questions of fact determined on the weight of conflicting evidence in an action at law tried to the court without a jury are not reviewable. The Appellate Court is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts found, and to reviewing errors of law committed as to the admission or rejection of testimony when the action of the court in this respect has been duly excepted to and the right to question the same has been properly preserved	9
Point II. The payment of freight charges, which, upon complaint of a shipper or consignee, are subsequently found by the Interstate Commerce Commission to be unjust and unreasonable, is presumptive and sufficient evidence of damage to the shipper or consignee to the extent of the difference between the amount paid by him under such rate, and what he would have paid under the rate found by the Commission to be a just and reasonable rate for the service rendered, and in such case the burden is upon the carrier to overcome such presumption by competent evidence and to show that such difference is not a proper measure of the shippers' or consignees' damage.....	10
Point III. There can be no abatement of damages on the principle of compensation received for loss or injury where it comes from a collateral source wholly independent of the party causing the damages, and which is as to him <i>res inter alios acta</i>	19
Point IV. Where a shipper or consignee has paid unjust and unreasonable charges for the transportation of freight he may recover as reparation or damages the difference between such unjust and unreasonable charges paid, and what is found to be just and reasonable charges for such service, even though such unjust and unreasonable charges were added to the selling price of the property transported, and even though he may not ultimately be damaged by the payment of a higher rate.....	29
Point V. If the judgment of the lower court should be affirmed Ballou & Wright should be allowed upon this writ of error a reasonable attorney's fee to be taxed as a part of the costs.....	40

TABLE OF CASES CITED

POINT I.

Empire State-Idaho Mining & Development Co. vs. Bunkerhill & Sullivan Mining & Concentrating Co. (114 Fed. 417).....	9
Los Angeles Gas & Electric Corporation vs. Western Gas Construction Co. (205 Fed. 707).....	9
Washington & Canonsburg Railway Co. vs. Murray (211 Fed. 440)	10
Nashville Interurban Railway vs. Barnum (212 Fed. 634).....	10
Busch vs. Stromberg-Carlson Telephone Mfg. Co. (217 Fed. 328)	10
Young vs. Amy (171 U. S. 179).....	10

TABLE OF CASES CITED

	Page
POINT II.	
Southern Pacific Co. vs. Goldfield Cons. Milling & Trans. Co. (220 Fed. 14)	10
Darnell-Taenzer Lumber Co. vs. Southern Pacific Co. (221 Fed. 890)	10
Meeker vs. Lehigh Valley R. R. Co. (236 U. S. 412).....	10
Mills vs. Lehigh Valley R. R. Co. (238 U. S. 473).....	10
POINT III.	
Regan vs. New York & New England R. R. Co. (60 Conn. 124).....	20
Western & Atlantic R. R. vs. Meigs (74 Ga. 857).....	20
Nashville, Chattanooga & St. Louis Ry Co. vs. Miller (120 Ga. 453)	20
Sherlock vs. Alling Adm'r. (44 Ind. 184).....	20
Perrott vs. Shearer (17 Mich. 48).....	20
Dillon vs. Hunt (105 Mo. 154).....	20
Cornish vs. North Jersey Street Ry. Co. (73 N. J. L. 273).....	20
Hammond vs. Schiff (100 N. C. 161).....	20
Cameron vs. Pacific Lime & Gypsum (73 Or. 510).....	20
Coulter vs. Township (164 Pa. St. 543).....	20
Harding vs. Townshend (43 Vt. 537).....	20
Clune vs. Ristine (94 Fed. 745).....	20
Brebham vs. Baltimore & Ohio R. R. Co. (220 Fed. 35).....	20
The Propeller Monticello vs. Mollison (17 How. 152).....	20
Hall & Long vs. Railroads (13 Wall. 367).....	20
Chicago, St. Louis & New Orleans R. R. Co. vs. Pullman Southern Car Co. (139 U. S. 79).....	20
POINT IV.	
Burgess vs. Transcontinental Freight Bureau (13 I. C. C. 668).....	29
Kindelon vs. Southern Pacific Co. (17 I. C. C. 251).....	29
Michigan Hardwood Mf'r. Ass'n. vs. Freight Bureau (27 I. C. C. 32)	29
Ballou & Wright vs. New York, New Haven & Hartford R. R. Co. (34 I. C. C. 120).....	29
Pilcher Hardware Co. vs. C. & N. W. R. R. Co. (37 I. C. C. 542)....	29
Wilkerson vs. Babbett (4 Dill. 208).....	38
Johnson vs. Moore (33 Kan. 90).....	38
Guckenheimer vs. Angevine (81 N. Y. 394).....	38
POINT V.	
L. & N. R. Co. vs. Dickerson (191 Fed. 705).....	40
Mills vs. Lehigh Valley R. R. Co. (226 Fed. 812).....	40
OTHER AUTHORITIES	
Act to Regulate Commerce	40
Sedgwick on Damages	19
Sutherland on Damages	19
Sheldon on Subrogation	38

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The New York, New Haven & Hartford Railroad Company, a corporation; Boston & Maine Railroad, a corporation; Central New England Railway Company, a corporation; The New York Central & Hudson River Railroad Company, a corporation; The Michigan Central Railroad Company, a corporation; Erie Railroad Company, a corporation; Chicago & Erie Railroad Company, a corporation; The Canadian Pacific Railway Company, a corporation; The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation; Spokane International Railway Company, a corporation; Chicago & Northwestern Railway Company, a corporation; The Chicago, Rock. Island & Pacific Railway Company, a corporation, and J. M. Dickinson, as Receiver thereof; Boston & Albany Railroad Company, a corporation; Union Pacific Railroad Company, a corporation; Oregon Short Line Railroad Company, a corporation; Oregon-Washington Railroad & Navigation Company, a corporation,

Plaintiffs in Error,

vs.

Ballou & Wright, a corporation,

Defendant in Error.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE NEW YORK, NEW HAVEN &
HARTFORD RAILROAD COMPANY,
a corporation, et al,

Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,

Defendant in Error.

Names and Addresses of the Attorneys of Record:

MR. H. A. SCANDRETT, 58 East Washington Street, Chicago, Illinois.

MR. ARTHUR C. SPENCER AND MR. CHARLES E. COCHRAN,
510 Wells Fargo Building, Portland, Oregon, for the
Plaintiffs in Error.

MR. WILL H. BARD, Pittock Building, Portland, Oregon,
and MR. JAMES E. FENTON, Claus Spreckels Building,
San Francisco, California, for the Defendant in Error.

STATEMENT OF THE CASE

This is an action, under Section 16 of the Act to regulate commerce as amended, to recover from the Railway Companies damages alleged to have been sustained by Ballou & Wright, consignee, and awarded by the Interstate Commerce Commission, by reason of the violation, by the Railway Companies, of the provisions of said Act against unjust and unreasonable rates and charges for the transportation of motorcycles.

In the years 1911, 1912 and 1913, Ballou & Wright, an Oregon corporation was engaged in the sale of motorcycles at Portland, Oregon. Between the 25th day of March, 1911, and January 1st, 1913, it shipped from Armory, Massachusetts, to Portland, Oregon, seven carloads of motorcycles, five carloads of which moved over the lines of the railways mentioned on page 13 of the record, one carload over the lines mentioned on page 35 and one carload over the lines mentioned on page 43, of the record. The aggregate weight of the shipments was 115,503 pounds and freight charges were collected in the sum of \$4620.12, based upon a commodity rate of \$4.00 per 100 pounds. Consignee contended that this commodity rate was unjust, unreasonable and excessive and on the 10th day of March, 1913, filed its complaint with the Interstate Commerce Commission against the Railway Companies in which it was alleged in substance that the commodity rate of \$4.00 per 100 pounds, charged and collected by the Railway Companies, was unjust and unreasonable and in violation of said Act and that a just and reasonable rate applicable to motorcycles would be not to exceed \$2.50 per 100 pounds with a 10,000 pounds carload minimum, and prayed that after a hearing and investigation by the Commission that an order be made requiring the Railway Companies to cease and desist

from the said violation of said Act and establish and put in force and apply as maximum in the future to the transportation of motorcycles in carloads between Armory, Massachusetts, and Portland, Oregon, in lieu of said commodity rate of \$4.00 per 100 pounds, a rate of \$2.50 per 100 pounds carload minimum, or such other rate as the Commission should deem just and reasonable; and also prayed that the Railway Companies should be required to pay it reparation for the said unlawful charges in the sum of \$1732.54 or such sum as the Commission should find the complainant entitled to under the evidence. The Railway Companies answered this complaint before the Interstate Commerce Commission, and denied in substance that the commodity rate of \$4.00 per 100 pounds was unjust or unreasonable or that the sum of \$2.50 per 100 pounds with the minimum of 10,000 pounds was a just or reasonable rate for the transportation of motorcycles; and they also denied that complainant had been overcharged in the sum of \$1732.54 or in any sum whatsoever, or that complainant was entitled to any reparation.

The matter came on for hearing before the Interstate Commerce Commission and upon the evidence adduced thereon the said Commission on the 3rd day of February, 1914, made its report in writing (Transcript of record, page 24), in which it found in substance that the commodity rate of \$4.00 per 100 pounds charged and collected by the Railway Companies from Ballou & Wright for said service, was unjust, unreasonable and excessive to the extent that it exceeded the first-class rate in effect at the time the said shipments were made, and further found that the shipper was *damaged* to the extent of the difference between the said commodity rate and the first-class rate in effect at the time said shipments moved. In other words, the Interstate Commerce Commission found that when the shipments which were made on March 25,

1911, March 9, 1912, April 19, 1912, and May 1, 1912, the first-class rate then in effect of \$3.00 per 100 pounds was a just and reasonable charge and should have been applied to motorcycles in carloads and that the commodity rate of \$4.00 per 100 pounds charged and collected was unjust, unreasonable and excessive to the extent of the difference between the said commodity rate and the said first-class rate then in effect; and that when the shipments were made on July 3, 1912, August 22, 1912, and January 3, 1913, the first-class rate then in effect of \$3.70 per 100 pounds was a just and reasonable charge and should have been applied to motorcycles in carloads, and that the commodity rate charged and collected was unjust, unreasonable and excessive to the extent of the difference between the said commodity rate and the said first-class rate then in effect; (Transcript of record, page 25); and subsequently and on the 14th day of August, 1914, the Commission made an order awarding to complainant reparation in the sum of \$828.13 with interest from January 1, 1913, and apportioned the said sum between, and ordered that the same be paid by the group of Railway Companies over whose lines the said respective shipments of motorcycles were moved, and directed that the said several sums with interest as apportioned between the said Railway Companies should be paid to complainant on or before the 1st day of October, 1914.

The Railway Companies having declined to pay the said reparation as awarded, consignee, on the 3rd day of June, 1915, filed its complaint in the District Court of the United States for the District of Oregon, to recover from the said several groups of Railway Companies the said damages sustained by it in consequence of the violation of the provisions of the said Act, together with a reasonable attorney's fee, costs and disbursements (Transcript of record, pages 5-48). The said complaint after setting out in detail the point of origin of

the shipments and date thereof, waybill number and date thereof, car number and initial, carriers interested and route, and point of destination, weight and commodity rate charged, weight and first-class rate in effect at the time said shipments moved, the amount of reparation due based upon the first-class rate in effect at the time of said shipments, and the amount of overcharge, alleges in substance that the commodity rate of \$4.00 per 100 pounds charged and collected by the Railway Companies was unjust, unreasonable and excessive, and that the first-class rate in effect at the time said shipments were made should have been applied to motorcycles in carloads, and that by reason of the said unjust, unreasonable and excessive rate charged and collected for said service, the petitioner, Ballou & Wright, suffered and sustained damages to the extent of the difference between the said commodity rate charged and collected and the reasonable amount which petitioner would have paid based upon the said first-class rate in effect at the time said shipments were made which should have been applied to motorcycles in carloads.

The Railway Companies answered this complaint and in substance denied that the said commodity rate charged and collected was unjust, unreasonable or excessive and denied that the said first-class rate in effect at the time said shipments were made was or is just or reasonable or that the same should have been applied to motorcycles in carloads; and for a further and separate answer and defense the Railway Companies alleged in substance that consignee in the management of its business, added an arbitrary sum of \$15.00 to the sale price of each motorcycle to cover the difference between the said commodity rate charged and collected and the first-class rate in effect at the time said shipments were made, the amount of said reparation claimed as damages.

Consignee interposed a demurrer to this further and

separate answer and defense and the court suspended ruling on this demurrer until after the testimony was taken. Thereupon consignee filed a reply denying in substance all of the matters contained in the said further and separate answer.

A jury was waived by each of the respective parties, and the Railway Companies having admitted all of the proceedings before the Interstate Commerce Commission, including the report of the Commission and order authorizing reparation, consignee offered testimony upon the subject of what would be a reasonable attorney's fee in the event it should prevail, and rested.

Certain stipulations were made between counsel for the respective parties, the substance of which was that the only question for determination of the court under the evidence was the reasonableness or unreasonableness of the rates charged and collected and the measure of damages, if any, sustained by consignee. The Railway Companies then offered in evidence certain proceedings had and taken before the Interstate Commerce Commission, including the pleadings and testimony, and rested. (Transcript of record, page 111).

The court thereupon sustained the demurrer of consignee to the further and separate answer and defense of the Railway Companies and made findings of fact and conclusions of law in favor of consignee and against the Railway Companies in accordance with the order of reparation of the Interstate Commerce Commission and entered a judgment as prayed for with attorney's fees and costs. (Transcript of record, pages 80-96).

The Railway Companies sued out this writ of error to review this judgment. The sole question involved in this case is:

What under the evidence in this case is the measure of consignee's damages?

CONTENTIONS OF THE CARRIERS.

The carriers in their brief make eight different contentions, but when boiled down and considered in the final analysis, their contention is succinctly and correctly stated in the language of the witness, Mr. R. C. Fyfe, Chairman of the Western Classification Committee, in his testimony given before the Interstate Commerce Commission (Transcript record, page 173), which is as follows:

“We further contend that the complainants are not entitled to any reparation or consideration on the past shipments on account of the fact that the freight paid has been *passed along* to the ultimate purchaser.”

CONTENTIONS OF CONSIGNEE.

Ballou & Wright contends:

I.

In an action at law tried to the court, findings on facts have the same effect as a verdict of a jury, and are conclusive on appeal unless there is no evidence to support them; and the court's refusal to find other facts is as conclusive on appeal as its findings. Questions of fact determined on the weight of conflicting evidence in an action at law tried to the court without a jury are not reviewable. The Appellate Court is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts found, and to reviewing errors of law committed as to the admission or rejection of testimony, when the action of the court in this

respect has been duly excepted to and the right to question the same has been properly preserved.

II.

The payment of freight charges, which, upon complaint of a shipper, or consignee, are subsequently found by the Interstate Commerce Commission to be unjust and unreasonable, is presumptive and sufficient evidence of damage to the shipper or consignee to the extent of the difference between the amount paid by him under such rate, and what he would have paid under the rate found by the Commission to be a just and reasonable rate for the service rendered and, in such case, the burden is upon the carrier to overcome such presumption by competent evidence and to show that such difference is not the proper measure of damages.

III.

There can be no abatement of damages on the principle of compensation received for loss or injury, where it comes from a collateral source wholly independent of the party causing the damages, and which is as to him *res inter alios acta*.

IV.

Where a shipper or consignee has paid unjust and unreasonable charges for the transportation of freight he may recover as reparation or damages the difference between such unjust and unreasonable charges paid, and what is found to be just and reasonable charges for such service, even though such unjust and unreasonable charges were added to the selling price of the property transported, and even though he may not ultimately be damaged by the payment of a higher rate.

V.

If the judgment of the lower court should be affirmed consignee should be allowed upon this writ of error a reasonable attorney's fee to be taxed as a part of the costs.

POINTS AND AUTHORITIES

I.

IN AN ACTION AT LAW TRIED TO THE COURT, FINDINGS ON FACTS HAVE THE SAME EFFECT AS A VERDICT OF A JURY, AND ARE CONCLUSIVE ON APPEAL UNLESS THERE IS NO EVIDENCE TO SUPPORT THEM; AND THE COURT'S REFUSAL TO FIND OTHER FACTS IS AS CONCLUSIVE ON APPEAL AS ITS FINDINGS. QUESTIONS OF FACT DETERMINED ON THE WEIGHT OF CONFLICTING EVIDENCE IN AN ACTION AT LAW TRIED TO THE COURT WITHOUT A JURY ARE NOT REVIEWABLE. THE APPELLATE COURT IS CONFINED TO DETERMINING WHETHER THE COURT BELOW ERRED IN THE CONCLUSIONS OF LAW DEDUCED BY IT FROM THE FACTS FOUND, AND TO REVIEWING ERRORS OF LAW COMMITTED AS TO THE ADMISSION OR REJECTION OF TESTIMONY, WHEN THE ACTION OF THE COURT IN THIS RESPECT HAS BEEN DULY EXCEPTED TO AND THE RIGHT TO QUESTION THE SAME HAS BEEN PROPERLY PRESERVED.

Empire State-Idaho Mining & Development Co.
vs. Bunker Hill & Sullivan Mining & Concentrating Company, 114 Fed. 417;

Los Angeles Gas & Electric Corporation vs. Western Gas Construction Co., 205 Fed. 707;

- Washington & Canonsburg Railway Co. vs. Murray, 211 Fed. 440;
 Nashville Interurban Railway vs. Barnum, 212 Fed. 634;
 Busch vs. Stromberg-Carlson Telephone Mfg. Co., 217 Fed. 328;
 Young vs. Amy, 171 U. S. 179.

II.

THE PAYMENT OF FREIGHT CHARGES WHICH, UPON COMPLAINT OF A SHIPPER OR CONSIGNEE, ARE SUBSEQUENTLY FOUND BY THE INTER-STATE COMMISSION TO BE UNJUST AND UNREASONABLE, IS PRESUMPTIVE AND SUFFICIENT EVIDENCE OF DAMAGE TO THE SHIPPER OR CONSIGNEE TO THE EXTENT OF THE DIFFERENCE BETWEEN THE AMOUNT PAID BY HIM UNDER SUCH RATE, AND WHAT HE WOULD HAVE PAID UNDER THE RATE FOUND BY THE COMMISSION TO BE A JUST AND REASONABLE RATE FOR THE SERVICE RENDERED AND IN SUCH CASE THE BURDEN IS UPON THE CARRIER TO OVERCOME SUCH PRESUMPTION BY COMPETENT EVIDENCE AND TO SHOW THAT SUCH DIFFERENCE IS NOT A PROPER MEASURE OF DAMAGES.

- Southern Pacific Company vs. Goldfield Consolidated Milling & Transportation Company, 220 Fed. 14;
 Darnell-Taenzer Lumber Company vs. Southern Pacific Company, 221 Fed. 890;
 Meeker vs. Lehigh Valley Railroad Company, 236 U. S. 412;
 Mills vs. Lehigh Valley Railroad Company, 238, U. S. 473.

In the case of Southern Pacific Company vs. Goldfield Consolidated Milling & Transportation Company, 220 Fed. 14, the plaintiff filed with the Interstate Commerce Commission a complaint against the railway companies alleging that it had been charged an unreasonable rate for the transportation of a carload of window sash from Youngstown, Ohio, to Goldfield, Nevada, and asking reparation. It was alleged in the complaint that the rate of \$3.44 per 100 pounds, published and charged by the carriers for transporting that commodity between the points mentioned, was unreasonable, and praying that an order be entered by the Commission declaring \$1.95 was a reasonable rate for such service and that the carriers be required to make their charge on that basis. *After the hearing before the Interstate Commerce Commission it rendered its decision holding that the rate complained of was unreasonable, and that the rate of \$1.95 was a reasonable rate for the service, and entered an order directing the carriers to publish the latter rate for such transportation, and found that the complainant in that proceeding was entitled to an award for reparation against the Southern Pacific Company and the Tonopah & Goldfield Railroad Company in the sum of \$447, with interest and ordered the said railway companies to pay said sum with interest to the complainant.* The railway companies having refused to pay the reparation as ordered by the Commission, the plaintiff commenced an action in the court below to recover the amount of such award. The railway companies in their answer set up that among other things that no evidence was introduced or offered and none heard by it, sufficient to justify its findings and decision. Upon the trial the plaintiff introduced in evidence the findings, conclusions and order of the Interstate Commerce Commission, and also exhibits. The railway companies offered no evidence except the transcript and exhibits which were before the Interstate Commerce

Commission. The trial court ordered a judgment in favor of the plaintiff for the amount of reparation awarded by the Interstate Commerce Commission and for costs. From that judgment a writ of error was taken and Judge Ross in rendering the opinion of this court at page 18, said:

“The fact that the defendant in error was damaged in the particulars specified, as well as the extent of such damage, was therefore expressly found by the Commission in the present case; and that finding of facts, like all other facts found by it, is, by the Interstate Commerce Act of February 4, 1887, as amended by the acts of March 2, 1889, and June 29, 1906 (24 Stat. c. 104, 25 Stat. c. 382, and 34 Stat. c. 3591 Comp. St. 1913, Sec. 8584), expressly made prima facie evidence. Being introduced by the plaintiff on the trial in the court below, and there being nothing in any of the other evidence given on the trial in conflict therewith, it must be here taken that the plaintiff in the case was damaged by the unlawful act of the defendants below, plaintiffs in error here, to the extent and in the amounts for which the court gave judgment.”

The case of Darnell-Taenzer Lumber Company vs. Southern Pacific Company, 221 Fed. 890, was an action brought by plaintiff and seven other lumber companies vs. Southern Pacific Company and twenty-five other railroads for the amount of reparation to which each plaintiff was entitled as against the respective railroad companies as awarded by the Interstate Commerce Commission. The railroad companies in answer to the complaint pleaded as their defense that the rate charged was not an unreasonable rate; and that the plaintiffs had not been damaged. Upon trial plaintiff put in evidence both reports and both orders of the Commission original and supplemental. There was also oral testimony on the

plaintiffs' part on the subject of damages; and testimony pro and con as to the reasonableness of the charges. At the close of the trial a verdict was directed for the railroad companies. This was assigned as error. In discussing this subject Knappen, Circuit Judge, in rendering the opinion of the court at page 891, said:

"The direction of verdict is here defended on the ground of utter lack of evidence that plaintiffs suffered damages. This contention involves the propositions: (1) That the reports and orders of the Commission are not *prima facie* evidence of damages or of the measure thereof; and (2) that both the facts found by the Commission and the oral evidence show that plaintiffs were not damaged.

"(1) *Since this case was brought here the Supreme Court, in the cases of Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed.— and Id. 236, U. S. 434, 35, Sup. Ct. 337, 59 L. Ed.— has held that the prima facie evidential effect given by the statute to 'the findings and orders of the Commission' includes the findings upon the questions 'whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages.'* Under the decisions in the Meeker cases, it is clear that the original and supplemental reports of the Commission considered together amount to a finding that the shippers were damaged by the excessive and unreasonable freight rates in question, and in the respective amounts stated in the reports and orders; in other words, that the amounts awarded represent the actual pecuniary loss of the respective plaintiffs. Unless, therefore, the facts found by the Commission, or the oral evidence presented at the trial, conclusively overcome the *prima facie* effect of the Commission's ultimate findings as to the fact and amount of damages, the direction of verdict was plainly erroneous.

"(2) *The Commission's report states that the*

amount of lumber shipped West from the points of origin here concerned is insignificant in comparison with the total amount handled on the Coast, and that the price of lumber so shipped is little influenced by Coast prices; *that shippers in Memphis have charged substantially the same price, whether 'sales were in the East or for export, or for shipment to California;'* and that thus *'the advance in the freight rate has been added to the price paid by the consumer.'* Defendants insist that this situation conclusively negatives the existence of pecuniary loss by the shippers. The Commission replied to this contention that it was impossible to say to what extent *'complainants may have been actually damaged by the advance in this rate, if the word "damage" is to be interpreted and applied as claimed by the defendants.'* The Commission, however, speaking through Commissioner Prouty, declined to accept defendant's interpretation of damage, saying:

" 'These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay.'

"In *Nicola, etc., Co. v. L. & N. Ry. Co.*, 14 Interst. Com. Com'n R. 199, 208, the Commission, speaking through Commissioner Clements, in reply to the carrier's contention that the consumer alone was damaged by the payment of the excessive freight charges, said:

*" 'The suggestion * * * would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the*

lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges. * * *

“We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between vendor and vendee of the lumber in reference to the rates or other considerations, the Commission is confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation.

“See, also, *Kindelon v. Railway Co.*, 17 Interst. Com. Com’n R. 251, 254, 255. And the Commission did not regard its findings on the subject of reparation as merely tentative, but as requiring:

“‘That degree of certainty and satisfactory conviction in the mind and judgment of the Commission as would be deemed necessary under the well-established principles of law as a basis for a judgment in court.’ *Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. R. Co.*, 20 Interst. Com. Com’n R. 43, 51.

“Since the foregoing decisions of the Commission the Supreme Court has held, in a case involving dis-

crimination in rates as between competing shippers, that the damages, recoverable by the shipper against whom the discrimination is practiced, must be proved; that the damages are not necessarily measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper, but may be more or less than such difference. *Penna. R. R. Co., v. International Coal Co.*, 230 U. S. 184, 203, 33 Sup. Ct. 893, 57 L. Ed. 1446. *While the Commission applies this rule in discrimination cases* (New Orleans Bd. of Trade v. Illinois Central R. R. Co., 29 Interst. Com. Com'n R. 32; Spiegle v. Southern Ry. Co. 32 Interst. Com. Com'n R. 687) *it has never in cases of purely unreasonable and excessive rates departed from the rule announced in the Burgess case.* A few of the many cases, subsequent to the International Coal Co. case, in which the rule in the Burgess case has been applied by the Commission are cited in the margin. While the Supreme Court in the Meeker cases reaffirmed the rule that damages in reparation cases must be proved, that court, so far as we have seen, has not passed directly upon the proposition involved in the Burgess case and in the instant case; the nearest approach thereto being *the holding in the Meeker cases that the Commission did not apply "an erroneous or inadmissible measure of damages" in finding that the shippers were damaged to the extent of the difference between what they actually paid and what they would have paid under a reasonable rate.* In the Meeker cases no evidence of damages was presented except the Commission's findings, and the evidence on which the Commission acted did not appear.

"We find nothing in either the International Coal Co. case or the Meeker cases conflicting with the view that damages resulting from the imposition of unreasonably excessive rates are normally measured by the difference between the rate charged and a reasonable rate. Cases of excessive and unreasonable rates differ from discriminating charges in the fact

that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful.

“We think the payment by the shipper of excessive and unreasonable freight charges naturally imports legal damage to the shipper therefrom, and that the rule as to the measure of damages applied by the Commission is a reasonable interpretation of the statute as applicable to reparation cases, to the extent of making payment of unreasonably excessive freight charges presumptive evidence of damage to the shipper to the extent of such excessive charges, and that the presumption of damage afforded by such payment can not be overcome by anything short of definite proof—not resting upon uncertainty or conjecture—negating the fact or the amount of damage. As said by the Commission in its first report in the Burgess case (13 Interst. Com. R. at page 680):

“‘If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them.’

“In our judgment a rule requiring the shipper to mathematically demonstrate that it was actually pecuniarily damaged to the amount of the unreasonable excess in rates so paid would effectually emasculate the reparation provision of the Interstate Commerce Act. We therefore think it clear that the Commission’s statement that the excessive freight rate had been added to the price paid by the consumer did not, as matter of law, and in view of the other considerations referred to by the Commission, overcome the prima facie effect of the findings that plaintiffs were damaged to the extent of such excessive freight rate actually paid by them.”

The case of Meeker vs. Lehigh Valley Railroad Company, 236 U. S. 412, was an action under Section 16 of the Act to Regulate Commerce, to recover from the Lehigh Valley Railroad Company damages alleged to have been sustained by shipper and awarded by the Interstate Commerce Commission by reason of the company's violation of the prohibition in Sections 1 and 2 of that Act against unreasonable rates and unjust discrimination. The plaintiff prevailed in the District Court, but the Circuit Court of Appeals reversed the judgment (211 Fed. 785) and the case was taken on a writ of certiorari to the Supreme Court of the United States. The Supreme Court in discussing the force and effect to be given to the reports and orders of the Interstate Commerce Commission in this case at page 429, said:

“But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission ‘upon consideration of the evidence adduced upon the hearing upon the question of reparation’ found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company, Meeker & Company were ‘damaged to the extent of the difference’ between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the coal company; and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were ‘damaged to the extent of the difference’ between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized

and required by Sec. 8 of the act to regulate commerce to award 'the full amount of damages sustained,' and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of *Pennsylvania R. Co. v. International Coal Min. Co.* 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. Rep. 893, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to Sec. 8, said (p. 203): 'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were they could be recovered.' There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.'

III.

THERE CAN BE NO ABATEMENT OF DAMAGES ON THE PRINCIPLE OF COMPENSATION RECEIVED FOR LOSS OR INJURY, WHERE IT COMES FROM A COLLATERAL SOURCE WHOLLY INDEPENDENT OF THE PARTY CAUSING THE DAMAGES, AND WHICH IS AS TO HIM RES INTER ALIOS ACTA.

Sutherland on damages, Sec. 158;
Sedgwick on damages, Sec. 67;

Regan vs. New York & New England R. R. Co.
60 Conn. 124;

Western & Atlantic Railroad vs. Meigs, 74 Ga.
857;

Nashville, Chattanooga & St. Louis Ry. Co. vs.
Miller, 120 Ga. 453;

Sherlock vs. Alling Adm'r., 44 Ind. 184;

Perrott vs. Shearer, 17 Mich. 48;

Dillon vs. Hunt, 105 Mo. 154;

Cornish vs. North Jersey Street Ry. Co., 73 N. J.
L. 273;

Hammond vs. Schiff, 100 N. C. 161;

Cameron vs. Pacific Lime & Gypsum, 73 Or. 510;

Coulter vs. Township, 164 Pa. St. 543;

Harding vs. Townshend, 43 Vt. 537;

Clune vs. Ristine, 94 Fed. 745;

Brebham vs. Baltimore & Ohio R. R. Co., 220 Fed.
35;

The Propeller Monticello vs. Mollison, 17 How.
152;

Hall & Long vs. R. R. Co's, 13 Wall. 367;

Chicago, St. Louis & N. O. Railroad vs. Pullman
Southern Car Co., 139 U. S. 79.

The case of Regan vs. New York & New England Railroad Company, 60 Com. 124, was an action to recover damages for the loss of goods belonging to the plaintiff, which were destroyed by a fire communicated by a locomotive engine belonging to and in the use of the defendant corporation. At the trial counsel for the defendant inquired of the plaintiff as a witness, if he had not received from the insurance companies some compensation for the damages to said goods by said fire. This question was objected to by plaintiff and excluded by the

court. Upon appeal the court in passing upon the admissibility of this question at page 129, said:

“But irrespective of the pleadings, the ruling complained of was clearly right upon the merits of the question. Any other conclusion would seem to us utterly at variance with established principles and sound reason, and contrary to an unbroken line of decisions by the courts of England and the United States.

“If the defendant is entitled to have the insurance money deducted from the amount otherwise due, it must be because it owns or has some legal claim to the money. How happens it that the defendant corporation is entitled to this money? Not because it ever paid the premium or any part of it, nor because the policy was obtained for its benefit or upon its request, nor because there is any privity between it and the insurance company. * * *

“The defendant, instead of paying anything toward procuring the policy, by its extraordinary use of the dangerous element of fire in close proximity to the plaintiff’s property, rendered it necessary for him to pay a much larger sum to obtain his insurance than would otherwise have been required.

“How then can the defendant claim, as it does, the exclusive benefit of the insurance? It came to the plaintiff from a collateral source, wholly independent of the defendant, and which as to him was “*res inter alios acta.*” The defendant, in our judgment, has no more claim to the insurance money than it would have to money obtained upon a subscription paper which the friends of Regan may have procured to make good his loss. How can the defendant make any distinction between money raised voluntarily after the loss and that obtained from a contract of indemnity to which it was no party and had paid no part of the consideration?

“The statute upon which the action is founded justly imposes an absolute primary liability on the defendant for having caused the loss. But the ruling

which the defendant asked for would completely nullify the statute as applicable to such a case as this, by practically imposing the primary obligation on the insurer who is innocent, and allowing the defendant, who caused the loss and who alone could have prevented it, to go entirely free, at least to the extent of the insurance.

“If the principles that underlie the defendant’s position are correct, had the loss been paid in full in ignorance of the fact that the plaintiff had obtained insurance, the defendant might bring a suit against the plaintiff to recover the money so paid; or had the money due on the policy not been paid, the defendant, after paying the loss in full, could intervene to prevent the amount due on the policy from being paid to the insured or any other than itself. *What a strange subrogation that would be, to put the party who caused the loss in the place of the insured to enforce the contract between the latter and his insurer! And what a strange revolution would be made in the relation of the parties were we to adopt the defendant’s contention! It has hitherto been established by a line of decisions reaching backward more than a century and substantially unbroken by dissent, that there is no privity in such cases between one made primarily liable for such a loss and an insurance company.*”

The case of *Sherlock vs. Alling*, Adm’r., 44 Indiana 184, was an action to recover damages for the death of one Sappington. The defendants in their answer set up in bar of a part of the damages claimed by plaintiff, an insurance of \$3000.00 on the life of Sappington for the benefit of his widow and children which had been paid. A demurrer was interposed to this part of the answer and sustained. Upon appeal the court at page 199 said:

“The sixth paragraph of the answer raises the question, whether the receipt of a sum of money by the persons for whose benefit the action is prose-

cuted, on account of a policy of insurance on the life of the deceased, can be shown to reduce the amount of the recovery. The argument urged in support of the position is, that the damages are recoverable for the death, and when that death brings money, which might not otherwise come to the party, a pecuniary benefit to the extent of the amount received has accrued to the party from the death; that if the wrongful act causing the death, has been the occasion of pecuniary benefit, the pecuniary damage can not be ascertained without deducting from the whole damage the pecuniary benefit. *If the argument is sound, it would apply to a case where the pecuniary benefit resulted by descent or devise. It proposes to use, as a defense to damages resulting from the wrongful act of the defendants, by way of set-off, recoupment, or in mitigation of such damages, pecuniary benefits received by the injured party, to which the defendants have not contributed, and not resulting from, or connected with, the act causing the death—benefits which it is fair to presume would have been realized at a future day without the aid of their wrongful act. To allow such a defence would defeat actions under the law, when the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children, and the wrong-doer would thus be enabled to protect himself against the consequences of his own wrongful act."*

The case of *Perrott vs. Shearer*, 17 Michigan 48, was an action of trespass against the defendant, who was a sheriff, for seizing and taking certain goods of the plaintiff. It appears that the goods while under the control of the defendant in pursuance of the attachment levied were accidentally destroyed by fire. The plaintiff held at the time insurance policies upon the goods to their full value and after the fire, presented to the insurance companies proofs of their loss and received pay therefor. Upon this state of facts it was claimed by the de-

fendant that plaintiff's position was the same as if he had repossessed himself of the goods by replevin; and that he was entitled to recover damages only for their detention up to the time of the fire. The trial court denied this claim of the defendant and instructed the jury that the plaintiff was entitled to recover the full value of the goods and plaintiff was given judgment for their value accordingly. Upon appeal, Cooley, Chief Justice, at page 56, said:

"It certainly strikes one, at first, as somewhat anomalous that a party should be in position to legally recover of two different parties the full value of goods which he has lost; but we think the law warrants it in the present case and that the defendant suffers no wrong by it. *He is found to be a wrong-doer in seizing the goods, and he can not relieve himself from responsibility to account for their full value, except by restoring them. He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists. * * ** The plaintiff recovers of the defendant for the wrong that has been done him in taking his goods; and he recovers of the insurance company a large sum for a small outlay, because such payment was the risk they assumed, and for which they were fairly compensated. *It is not a question of importance in this inquiry, whether the act of the defendant caused the loss or not—his equitable claim to a reduction of damages, if he could have any, would spring from the fact that the plaintiff recovers pay for his property twice; but the answer to that is that he recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities.*"

The case of *Harding vs. Townshend*, 43 Vermont, page 536, was an action on the case for damages sustained by plaintiff by reason of an insufficiency of a highway of the defendant. The sole question in this case was the amount of damages which plaintiff was entitled to recover. The plaintiff was a witness, and on cross-examination the defendant asked him if he had not received money from an accident insurance company on account of the injuries for which he claimed to recover, to which the plaintiff objected, but the court overruled the objection and permitted the inquiry to be put and answered, to which the plaintiff excepted. The plaintiff answered that he had received \$130.00 and that the expenses of the insurance were \$7.00. At the request of the defendant, the court charged the jury that the \$123.00, the net proceeds of the insurance, should be deducted from the damages sustained by the plaintiff, to which the plaintiff excepted. Upon appeal the court in discussing this ruling and charge of the court at page 538 said:

“There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or enure to the benefit of the defendant. *The insurer and the defendant are not joint tortfeasors or joint debtors so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter.* * * *

“But it is urged, on the part of the defense, that the plaintiff is entitled to but one satisfaction for the injury he has sustained. If we assume this to be a correct proposition, the question arises whether the defendant stands in a position to make this objection. This depends on the question who, as between the insurer and the defendant, ought to pay

the damage—which of the two ought primarily to make compensation to the plaintiff and ultimately to bear the loss? If the insurer ought ultimately to bear the loss, the defendant is entitled in this action to have the benefit of that payment; but if the defendant should ultimately bear the loss, then the payment by the insurer and the collection of the entire damage of the defendant only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them, in which the defendant has no interest and with which he has no concern. *The statute imposes upon the towns severally the duty of keeping their highways in good and sufficient repair, and makes each town liable for any special damage happening to any person by reason of the insufficiency or want of repair of any highway in such town. The defendant is found liable in consequence of the breach of this duty. The defendant town, therefore, in respect to the injury the plaintiff has sustained, is the wrong-doer; and whether such by some positive, affirmative act, or by culpable negligence, does not vary the principle applicable to the case. In such case, as between the insurer and the wrong-doer, in reason and justice the burden of making compensation to the injured party ought to be ultimately borne by the party thus in fault. The party whose wrongful act or culpable negligence caused the injury ought to make compensation and bear the loss. Therefore, if there is any such connection between these two remedies as to have the enforcement of one operate in defense or mitigation of the other, it is the insurer, and not the town, that should be entitled to this benefit. It would seem to be a perversion of justice to subrogate the wrong-doer, who has caused the loss, to the rights of the injured party as to his remedy against the insurer.”*

The case of *The Western and Atlantic Railroad vs. Meigs*, 74 Georgia, page 857, was an action to recover damages for a death of a husband. The trial court was requested to instruct the jury that if they found from the

evidence that plaintiff received life insurance money upon the death of her husband they might consider the amount so received and what income it was producing, in arriving at the amount of damages. Upon appeal the court at page 867 said:

“Damages to which a widow is entitled from a railroad company for the homicide of her husband should not be reduced by the amount of insurance paid to her on his life. If her recovery could thus be reduced, it might be insisted that, where the husband’s life was insured for more than she was allowed to recover under the law as its actual cash value, the company could claim a balance against the family of the deceased, on the idea that the killing of the husband and father was a positive pecuniary benefit to them.”

The case of Nashville, Chattanooga and Saint Louis Railway Company vs. Miller, 120 Georgia, page 453, was an action brought by a railway mail clerk to recover damages against the railroad company for injuries received as the result of a collision between the train upon which he was working and another train. The trial court instructed the jury as follows: “It is immaterial whether the Government paid the plaintiff anything or not; that would not affect the rights of the plaintiff in this case to recover against the railroad company.” The railroad company requested the court to instruct the jury as follows: “Plaintiff admits in his testimony that he received from the Government his regular salary during the time he did not work on account of his injury. This being so, I charge you that he can not recover anything on this account for time lost as claimed in his declaration.” The railroad company assigned as error the giving of the former charge and the refusal to give the latter. Upon appeal the court in discussing this assignment of error at page 455 said:

“In considering whether the assignments of error under consideration are well taken it is necessary to determine whether the payment referred to in the testimony was of such a character as to preclude the plaintiff from claiming compensation for lost time against the railway company. *When one engaged in any calling or vocation, from which he derives a pecuniary benefit, is compelled to give up, for a time, the performance of his duties, as the result of an injury inflicted upon him by a wrong-doer, he is entitled, as a general rule, to demand compensation from the time thus lost at the hands of the wrong-doer who inflicted the injury. The general rule is, that where a wrong-doer causes time to be lost, he will not be heard to say that the person injured has suffered no pecuniary loss, because he has received, as a direct result of being injured, contributions which in amount aggregate more than what would have been earned during the time; nor will his liability be diminished to the extent of contributions which were less than what would have been earned. If from motives of affection, philanthropy, or as the result of a contract, the plaintiff has received from one other than his employer any sums the reception of which is directly attributable to the fact that he has been injured, the person causing the injury will not be allowed to urge the payment of such sums in mitigation of the damages claimed against him.*”

The case of *Clune vs. Ristine*, 94 Fed. 745, was an action against Ristine as receiver of the Colorado-Midland Railroad Company, to recover damages for the death of a son of plaintiff. In the course of the trial the court permitted defendant to prove by way of mitigating damages which the plaintiff might recover, that she had collected from an insurance company, for the death of her son, the sum of about \$2000.00, and for that reason was not entitled to recover to the full extent of

her loss. An exception was taken to the admission of this evidence. Upon appeal the court at page 749 said:

“We think that the testimony should have been excluded, and that the objection thereto was well taken. When an action is brought against a wrongdoer, he is not entitled to have the damages consequent upon the commission of his wrongful act reduced by proving that the plaintiff has received compensation for the loss from a collateral source wholly independent of himself.”

IV.

WHERE A SHIPPER OR CONSIGNEE HAS PAID UNJUST AND UNREASONABLE CHARGES FOR THE TRANSPORTATION OF FREIGHT, HE MAY RECOVER AS REPARATION OR DAMAGES, THE DIFFERENCE BETWEEN SUCH UNJUST AND UNREASONABLE CHARGES PAID, AND WHAT IS FOUND TO BE JUST AND REASONABLE CHARGES FOR SUCH SERVICE, EVEN THOUGH SUCH UNJUST AND UNREASONABLE CHARGES WERE ADDED TO THE SELLING PRICE OF THE PROPERTY TRANSPORTED, AND EVEN THOUGH HE MAY NOT ULTIMATELY BE DAMAGED BY THE PAYMENT OF A HIGHER RATE.

Burgess v. Transcontinental Freight Bureau, 13 I. C. C. 668;

Kindelon v. Southern Pacific Company, 17 I. C. C. 251;

Michigan Hardwood Mfg'r. Ass'n. v. Freight Bureau, 27 I. C. C. 32;

Ballou & Wright v. N. Y., N. H. & H. R. R. Co., 34 I. C. C. 120;

Pilcher Hardware Co. v. C. & N. W. R. R. Co., 37 I. C. C. 542.

In the case of *Burgess vs. Transcontinental Freight Bureau*, 13 I. C. C. 668, complaint was made before the Interstate Commerce Commission that the rate charges as paid by the shippers were unjust and unreasonable and reparation was claimed. The railway companies contended that the complainants should not be awarded reparation even though the Commission was of the opinion the rate charges were, and had been excessive, for the reason as alleged that no damage upon the part of the complainants had been established. The Interstate Commerce Commission in passing upon this question at page 679 said:

“The complainants claim reparation by reason of shipments made under the 85-cent rate. The defendants deny that the complainants should be awarded such reparation, even though the Commission be of the opinion that that rate is and has been excessive, for the reason that no damage upon the part of the complainants has been established.

“This case shows that hardwood lumber has moved to the Pacific Coast in larger quantities since the rate was advanced in 1904 than it did previously. The use of hardwood upon the Pacific Coast has very much increased. Importations from foreign countries have been greater and shipments from the East have also grown. The amount of lumber sent West from these points of origin is insignificant in comparison with the total amount handled, and the price is but little influenced by the market upon the Pacific Coast. The dealer in Wisconsin or at Memphis has charged substantially the same price whether his sales were in the East or for export or for shipment to California, and this means, of course, that the advance in the freight rate has been added to the price paid by the consumer. The defendants say that it follows that the complainants who have paid this freight rate have not actually been injured.

“It appeared that one witness suspended operations upon the Pacific Coast owing to the advance in the rate, and other witnesses were of the opinion that more lumber would have been sold under the 75-cent rate. It is impossible to say, therefore, to what extent these complainants may have been actually damaged by the advance in this rate, if the word damage is to be interpreted and applied as claimed by the defendants.

“Such is not, in our opinion, the proper meaning of this term. *These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported.*”

In the case of *Kindelon vs. Southern Pacific Co.*, 17 I. C. C. 251, the complaints of the shippers involved the reasonableness of rates for the transportation of hardwood lumber in carloads from various points along and west of the Mississippi River to San Francisco, California, and other Pacific terminals. The complainants asked for reparation. The railway companies in that case also contended that complainants had not shown damages. The Commission at page 254 said:

“The defendants further contend that the complainants herein have not shown that they were damaged. *It is well settled that reparation in any given case is due the person who has been required to pay an unlawful charge as the price of transportation, the shipper who has been charged an unlawful rate and who is the owner of goods transported is entitled to repayment without the imposition of the impossible task upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper. Moreover, the owner of the freight who has been required to pay an unreasonable rate is entitled, upon proper complaint and showing, to reparation irrespective of the profits accruing from his business.*”

The case of Ballou & Wright vs. N. Y., N. H. & H. R. R. Co., 34 I. C. C. 120, is similar to the instant case. In that case the establishment of reasonable rates was asked and reparation to the extent that the commodity rates applied to the respective shipments exceeded the first-class rates contemporaneously in effect. The parties were the same and the same questions were involved as in this case. In that case the Commission at page 121 said:

“The case is similar to Ballou & Wright vs. N. Y., N. H. & H. R. R. Co., Docket No. 5616, in which the rates applied on similar shipments were found unreasonable and reparation was awarded. A copy of the transcript of testimony in that case was introduced in evidence in this proceeding, with certain additional evidence adduced to establish the fact of the shipments here involved. *The single question contested is complainant's right to reparation, defendants showing that complainant added an arbitrary sum of \$15 to the sale price of each motorcycle to cover freight and local drayage charges, from which they argue that complainant suffered no damage and therefore is not entitled to reparation.* * * *

“Carriers can not be heard to say that reparation for the exaction of unreasonable freight rates should be denied because the shipper or consignee from whom the same has been collected has on that account secured a higher price for the commodity from his purchaser.”

ARGUMENT.

That the commodity rate of \$4.00 per 100 pounds charged and collected by the carriers was unjust, unreasonable and excessive and that the first-class rate contemporaneously in effect was a just and reasonable rate and should have been applied to motorcycles in carloads, stands admitted in this case.

Mr. R. C. Fyfe, Chairman of the Western Classification Committee, in his testimony before the Interstate Commerce Commission in this case testified as follows:

“Our contention in this case is, that first-class rating, carload, being in effect in the territory in which the machines are manufactured, and which was established by the Commission in Opinion No. 2168, 26 I. C. C., page 127, and the fact that the manufacturers prayed to the Classification Committee for this rating, that first-class is reasonable and just and the classification should be permitted to apply on all of this traffic.” (Transcript of record, page 173.)

The reduction to the first-class rate in the Western Classification referred to by Mr. Fyfe was not effective or published until after the filing by Ballou & Wright of its complaint before the Interstate Commerce Commission. (Transcript of record, p. 177.)

The Railway Companies in their brief admit that the

commodity rate charged Ballou & Wright was unjust and unreasonable and that the first-class rate contemporaneously in effect was reasonable when they say:

“The sole question for decision is:

“What is the measure of the damage recoverable * * * in cases arising out of the violation of Section 1 of the Act, which requires all charges in respect to transportation to be just and reasonable and which prohibits unjust and unreasonable charges?” (Brief plaintiff in error, p. 24.)

But the Railway Companies contend in the first place that there is no evidence in this case showing that the payment by Ballou & Wright of the said freight charges, found and admitted to be unjust and unreasonable, caused it to suffer any damages.

The testimony before the Interstate Commerce Commission which was introduced by the Railway Companies upon the trial of the case below upon this subject is as follows:

C. F. WRIGHT.

Testified:

Ballou & Wright is a distributor of motorcycles, bicycles, and automobiles with the head office in Portland and a branch office at Seattle, Washington. I am familiar with the shipments involved in this complaint. The freight charges were paid on these shipments by Ballou & Wright; and they were not charged back to the shipper. (Transcript of record, p. 162.)

The carload shipments made by Ballou & Wright are confined to one brand, The Indian, manufactured by the Hendee Manufacturing Company, Springfield, Massachusetts. The average cost of the Indian motorcycle to Ballou & Wright is approximately \$175.00 to \$180.00; and the average weight of each machine is 330 pounds. (Transcript of record, page 163).

In figuring the cost value of any article no matter whether it is a motorcycle or stove, or what it may be, the freight is always added. We have added to the price of our goods, freight, add it in any line of goods, no matter whether it be lamps, horns or anything else. The \$15.00 which is added to the price includes all handling charges. (Transcript of record, page 169).

This charge of \$15.00 is not made for freight alone. A motorcycle that retails for \$250.00 in the East retails by Ballou & Wright for \$265.00. That is, the price that is tacked on; the customer don't ask how or where that price is arrived at and he is not told. We have to do that on account of the high freight charges. We have had to add to the price of motorcycle horns because we have had to pay excessive freight charges. A machine that we pay \$180.00 for would retail for \$265.00 and in the \$15.00 we add the cost of handling. (Transcript of record, page 170).

Learned counsel for the Railway Companies in their brief cite a number of discrimination cases in which it is held that no recovery can be had without proof of actual pecuniary loss; and an ingenious effort is made on the part of counsel to apply the same rule as to the measure of damages and proof thereof in cases where the rates charged were unjust and unreasonable, as in cases where the carriers are guilty of unjust discrimination.

It is sufficient answer to say that it has been uniformly held by the courts of last resort that the rule as to the measure of damages in the two classes of cases is not necessarily the same.

In a case predicated upon unjust discrimination in rates the damages suffered, if any, is not always measurable by the exact difference in the rates, it may be more or less. Loss of profits resulting from unfair competition might be an important element in discrimination

cases; but in the instant case it conclusively appearing from the testimony of Mr. Fyfe, and the Interstate Commerce Commission as well as the lower court having found, that the commodity rate of \$4.00 per 100 pounds charged and collected from Ballou & Wright on the shipments made by it was unjust and unreasonable to the extent it exceeded the first-class rate contemporaneously in effect, and it being admitted by the Railway Companies that the commodity rate charged and collected from Ballou & Wright was unjust and unreasonable and that the said first-class rate was a just and reasonable rate, the findings of the Interstate Commerce Commission as well as the findings of the lower court that Ballou & Wright was damaged in an amount equal to the difference between the amount paid by it under such unjust and unreasonable rate, and the amount it would have paid at the first-class rate contemporaneously in effect, is conclusive.

The findings of the Interstate Commerce Commission and the trial court that the said commodity rate charged and collected was unjust and unreasonable and that the first-class rate contemporaneously in effect was a just and reasonable rate and should have been applied to the said shipments made by Ballou & Wright, being admitted by the Railway Companies to be correct, then the only question which remained for the court to determine, was the amount of damages suffered and sustained by Ballou & Wright.

In the absence of any evidence to the contrary this was a mere matter of computation—the difference between the unjust and unreasonable rate charged and collected and what Ballou & Wright would have paid at the first-class rate contemporaneously in effect. If this was not the measure of Ballou & Wright's damages the burden was upon the Railway Companies to establish that fact.

This the Railway Companies attempted to do by showing that Ballou & Wright added an arbitrary sum of \$15.00 to the sale price of each motoreycle to cover the excessive freight exacted from it by the Railway Companies; and the Railway Companies say to Ballou & Wright: "We admit that, in the first instance you were damaged to the extent of the difference between the unjust and unreasonable rate charged and collected and the first-class rate contemporaneously in effect, but you can not recover these damages because the overcharge and excess resulting in the difference of said rates, in the language of Mr. Fyfe, 'has been *passed along* to the ultimate purchaser.' " (Transcript record, page 173).

This doctrine has the merit, at least, of being novel, even though its effect, if put in practice, would be to tear up by the roots the ancient and hitherto unquestioned doctrine founded upon the maxims, *injuria propria non cadet beneficium facientis*, and *jus ex injuria non oritur*.

By Section 1 of the Act to regulate commerce, "Every unjust and unreasonable charge" for the transportation of property "is prohibited and declared to be unlawful."

In this case the carriers in their brief admit that the rates charged and collected from Ballou & Wright were unjust and unreasonable, but they say it can not recover damages by reason thereof because the excessive rate charged has been "passed along" to the ultimate purchaser. If this be true the prohibition in Section 1 of the Act to regulate commerce against unjust and unreasonable charges and declaring such charges unlawful, is of no force or effect whatever. If the argument of counsel for the carriers is carried to its logical conclusion, carriers might charge and collect any extortionate rate however unreasonable, and if the same was "passed along" to the ultimate purchaser there could be no recovery.

Such construction of the Act to regulate commerce would absolutely destroy its object and purpose.

Certainly the carriers can not contend that because the consignee "passed along" the excessive charge to the ultimate purchaser, they can invoke the doctrine of subrogation.

It is elementary that the doctrine of subrogation will not be applied to relieve a party from the consequences of his own unlawful act.

Sheldon on subrogation, Sec. 44;
 Wilkerson vs. Babbett, 4 Dill. 208;
 Johnson vs. Moore, 33 Kan. 90;
 Guckenheimer vs. Angevine, 81 N. Y. 394.

Besides there is no privity between the carriers in this case and the ultimate purchaser. Assuming that the excessive rate charged and collected was "passed along" to the ultimate purchaser, by the addition of an arbitrary sum of \$15.00 to the sale price of each motorcycle, the amount thus received was paid to Ballou & Wright from a collateral source wholly independent of the carriers and which, as to them was *res inter alios acta*. There is no privity between the carriers who are primarily liable to plaintiff for the damages sustained, and the ultimate purchaser. After the carriers charged and collected the unjust and unreasonable rates they had no concern with any contract subsequently made by Ballou & Wright with the ultimate purchaser to recoup its damages; and the rights and liabilities of the carriers could neither be increased nor diminished by the fact that such contract was subsequently made. As was well said in the case of Clune vs. Ristine, 94 Fed. 745, "When an action is brought against a wrong-doer he is not entitled to have the damages, consequent upon the commission of his wrongful act, reduced by proving that the plaintiff has received

compensation for the loss from a collateral source wholly independent of himself."

If the carriers in this case are entitled to deduct from the damages the excessive charge "passed along" to, and paid by the ultimate purchaser, it would necessarily be upon the theory that they had a right of action for the excess thus "passed along." If the rule invoked by the carriers is the test as to the proper measure of damages, then if the excess freight charges "passed along" to, and paid by, the ultimate purchaser exceeded the amount of the shipper's damage, the carriers by parity of reasoning would be entitled such excess.

To carry the syncretism of the Railways further, had the excessive freight charges been refunded by the Railways in ignorance of the fact that such charges had been *passed along* and paid by the ultimate purchaser, the Railway Companies might bring suit against Ballou & Wright to recover the money so refunded; or had the excessive freight charges not been "passed along" and paid by the ultimate purchaser, the Railway Companies after paying the same, could intervene to prevent the ultimate purchaser from paying the same to Ballou & Wright or to any other than themselves. Such a doctrine would relieve a party from the consequences of his own unlawful act.

Stripped of sophistry and refined reasoning the position of the Railway Companies, plainly stated, is,—they ask to have the damages consequent upon the commission of their own wrongful acts, reduced by proving that Ballou & Wright *passed along* the excessive freight charges, and collected the same from the "ultimate purchaser." They attempt to mitigate and reduce the damages resulting from their own unlawful acts by monies arising from a contract subsequently entered into between Ballou & Wright and the "ultimate purchaser."

A contract with which the Railway Companies had no concern, and to which they were neither a party nor privy.

The argument on the part of the Railway Companies is specious but fallacious and if given any controlling force the effect would be to rehabilitate and put in operation the predatory maxim which prevailed prior to the enactment of the Interstate Commerce Act—"charge all the traffic will bear;" and upon complaint being made by the merchant or dealer the Railway Companies could say without fear or hindrance, "We admit that we have charged you a rate unjust, unreasonable and excessive, but you can not recover from us, because you have *passed it along* to the ultimate purchaser, the man in overalls at the end of the line will have to 'pay the freight.'"

Such a doctrine is monstrous and has no place in the annals of jurisprudence.

V.

IF THE JUDGMENT OF THE LOWER COURT SHOULD BE AFFIRMED, BALLOU & WRIGHT SHOULD BE ALLOWED UPON THIS WRIT OF ERROR A REASONABLE ATTORNEY'S FEE, TO BE TAXED AS A PART OF THE COSTS.

Act to Regulate Commerce, Section 16;

L. & N. R. Co. vs. Dickinson, 191 Fed. 705;

Mills vs. Lehigh Valley R. R. Co., 226 Fed. 812.

In the case of Louisville & N. R. Co. vs. Dickerson, *supra* the court at page 712 said:

"Section 16 provides that, if in a suit against a common carrier to compel compliance with an order for the payment of money "*the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of*

the costs of the suit.” Plaintiff asks an allowance on account of the appellate proceedings, in addition to the allowance made by the Circuit Court. We think it is competent to make such additional allowance if the case is brought within the commerce act. Defendant contends it is not so brought on the ground that the diversion was not a violation of any section of the act, on the authority of *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 208, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. We think the authority cited does not apply to this case. There the action was against an initial carrier for the loss of goods by a connecting carrier. The attorney fee was claimed under section 8 of the act, which provides therefor in case of recovery against a carrier for doing anything prohibited or declared unlawful by the act, or omitting to do anything required thereby. The damage claim was held not to be in consequence of a violation of the Interstate Commerce Act. Here, as already said, the attorney fee is provided by section 16 in a suit for the reparation awarded by the Commission.

“We think the case is brought directly within section 16, and that the plaintiff should be allowed \$100 additional attorney’s fee on account of the proceedings under appeal to this court.”

It is respectfully submitted that the judgment of the lower court should be affirmed and upon such affirmance the defendant in error should be allowed the sum of \$250.00 as a reasonable attorney’s fee to be taxed as a part of its costs upon this writ of error.

WILL H. BARD,

JAMES E. FENTON,

Attorneys for Defendant in Error.

United States Circuit Court of Appeals

For the Ninth Circuit

The New York, New Haven & Hartford Railroad Company,
a corporation; Boston & Maine Railroad, a corporation;
Central New England Railway Company, a corporation;
The New York Central & Hudson River Railroad Company,
a corporation; The Michigan Central Railroad Company,
a corporation; Erie Railroad Company, a corporation;
Chicago & Erie Railroad Company, a corporation; The
Canadian Pacific Railway Company, a corporation; The
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,
a corporation; Spokane International Railway Company,
a corporation; Chicago & Northwestern Railway Company,
a corporation; The Chicago, Rock Island & Pacific Railway
Company, a corporation, and J. M. Dickinson, as Receiver
thereof; Boston & Albany Railroad Company, a corporation;
Union Pacific Railroad Company, a corporation; Oregon
Short Line Railroad Company, a corporation; Oregon-
Washington Railroad & Navigation Company, a corporation,
Plaintiffs in Error,

vs.

Ballou & Wright, a corporation,

Defendant in Error.

Reply Brief of Counsel for Plaintiffs
in Error

NOV 13 1916

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

F. C. Monckton

United States Circuit Court of Appeals

For the Ninth Circuit

THE NEW YORK, NEW HAVEN &
HARTFORD RAILROAD COM-
PANY, a corporation, et als,
Plaintiffs in Error,

vs.

BALLOU & WRIGHT, a corporation,
Defendant in Error.

Names and Addresses of the Attorneys of Record.

MR. H. A. SCANDRETT,

58 East Washington Street, Chicago, Illinois.

MR. ARTHUR C. SPENCER and MR. CHARLES
E. COCHRAN,

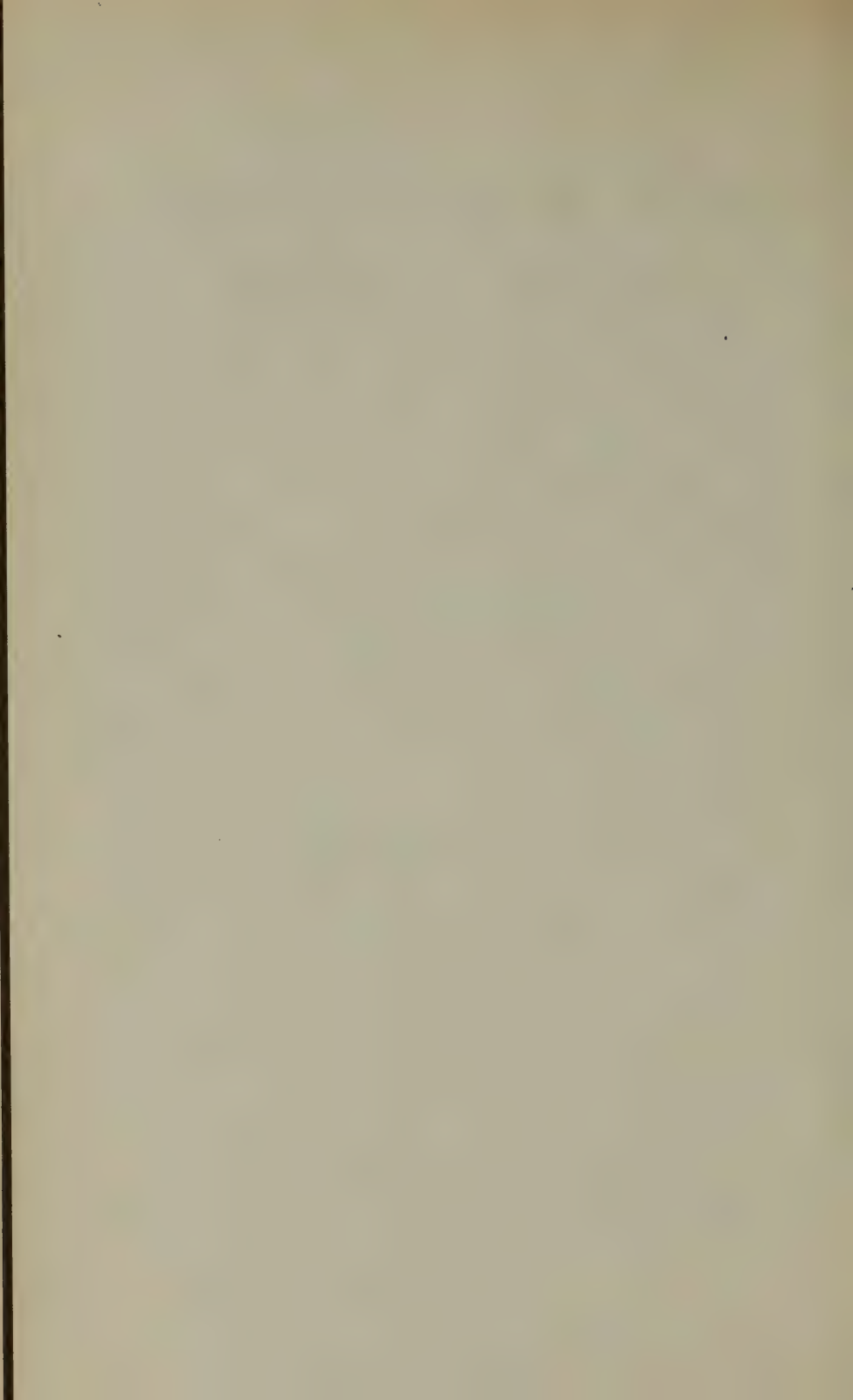
510 Wells-Fargo Building, Portland, Oregon,
For the Plaintiffs in Error.

MR. WILL H. BARD,

Pittock Building, Portland, Oregon,
and

MR. JAMES E. FENTON,

Claus Spreckles Building, San Francisco, Califor-
nia, for the Defendant in Error.



United States Circuit Court of Appeals

For the Ninth Circuit

The New York, New Haven & Hartford Railroad Company, a corporation; Boston & Maine Railroad, a corporation; Central New England Railway Company, a corporation; The New York Central & Hudson River Railroad Company, a corporation; The Michigan Central Railroad Company, a corporation; Erie Railroad Company, a corporation; Chicago & Erie Railroad Company, a corporation; The Canadian Pacific Railway Company, a corporation; The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation; Spokane International Railway Company, a corporation; Chicago & Northwestern Railway Company, a corporation; The Chicago, Rock Island & Pacific Railway Company, a corporation, and J. M. Dickinson, as Receiver thereof; Boston & Albany Railroad Company, a corporation; Union Pacific Railroad Company, a corporation; Oregon Short Line Railroad Company, a corporation; Oregon-Washington Railroad & Navigation Company, a corporation,
Plaintiffs in Error,

vs.

Ballou & Wright, a corporation,

Defendant in Error.

Reply Brief of Counsel for Plaintiffs in Error

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

This case was argued and submitted to the
Court October 24, 1916. The brief of counsel

for the defendant in error was served October 23, 1916. For this reason it became necessary for the plaintiff in error to reserve time within which to reply to the contentions of the defendant in error, in so far as its brief has raised new questions or reasons for the affirmance of the judgment of the court below.

THE CLAIM OF DEFENDANT IN ERROR THAT ABATEMENT OF DAMAGES CANNOT BE HAD ON THE PRINCIPLE OF COMPENSATION RECEIVED FOR LOSS OR INJURY, FROM A COLLATERAL SOURCE INDEPENDENT OF THE PARTY CAUSING THE DAMAGES, HAS NO APPLICATION TO THIS CASE.

On page 19 *et seq.* of counsel's brief, the point is made that the doctrine applied in certain insurance and negligence cases, whereby a *tort feasor* is foreclosed from pleading in defense of its wrongdoing, that a plaintiff has been compensated by certain insurance money recovered and the like, is controlling.

These cases, and the principles supported by them, have no application to the case at bar. If there was a statute in terms permitting the recovery by a shipper from a carrier of the difference between a published and filed rate, which the Commission had found unreasonable, and a rate which the Commission found to be reasonable, then it might be argued with some degree of analogy that the carrier could not in defense of such action be heard to say that the shipper had received such or similar money from his customer. But there is no such statute. The Act to

Regulate Commerce does not contemplate such recovery. We are certainly justified in the assertion that if such was the intention of the Congress, apt words so indicating would have been used. In place of declaring, as it did in Section 8 of the Act to Regulate Commerce, that the carrier shall be liable not to the shipper but to the person or persons "injured thereby" for the damages sustained in consequence of any violation, the Congress would have said in apt words and of clear import, that the shipper, whenever a rate is found unreasonable, shall be allowed to recover the difference between such rate and a rate fixed by the Commission as reasonable. The very fact that the Congress did not so enact, is persuasive evidence that it did not so intend. The liability arising from the collection of an excessive rate is not to return such excess, but to pay damages. In this respect the case is to be distinguished from those referred to by counsel in their brief at page 19.

The elements which constitute a cause of action, as the phrase is used in the law, is probably best stated by Mr. Pomeroy in his "Remedies and Remedial Rights," Par. 3 c, 3, and also section 518, and 519, wherein Mr. Pomeroy says:

"The cause of action, therefore, must always consist of two factors: the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property or contract; and the delict or wrongful act or omission of the defendant, by which the primary right and duty have

been violated. Every action, when analyzed, will be found to contain these two combinations. They constitute the cause of action." See also

Patterson v. Wold, 33 Fed. 791.

Take the case of *Regan v. New York & New England R. R. Co.*, 60 Conn. 124, quoted and referred to on page 20 of the brief of the defendant in error. It is there said that this action was an action to recover damages for the loss of goods belonging to plaintiff, which were destroyed by a fire communicated by a locomotive belonging to and in the use of the defendant corporation.

Applying Mr. Pomeroy's definition of a cause of action to that case, it will be found that the plaintiff's primary right was to the ownership, possession and enjoyment of the goods, the subject of the action. The defendant's corresponding primary duty was to so operate its railroad as to not interfere with the plaintiff in his ownership and possession of such goods. The delict or wrongful act of the defendant was the negligent destruction of such goods. It was this delict by which the plaintiff's primary right and duty was violated. And the Court very properly held in the *Regan* case that the fact that he had received insurance was not material to such cause of action or defense.

Now, in the case at bar the cause of action is entirely dissimilar. It is not for the specific goods destroyed, or to state it differently, it is not for the recovery of the specific funds paid out. The cause of action, that is, the plaintiff's primary right, is to have the defendant continue

its transportation business in accordance with the Act to Regulate Commerce. The defendant's corresponding primary duty is to comply with the Act to Regulate Commerce. The delict or wrongful act or omission of the carrier is the violation of that Act, whereby a recovery is granted for "the full amount of damages sustained in consequence of any such violation, etc."

To restate the application of Mr. Pomeroy's rule, we assert that the primary right of the plaintiff in error is to continue its business of distributing motorcycles in a manner free from injury by the carrier. The corresponding primary duty of the railroad companies is to refrain from violating any of the provisions of the Act to Regulate Commerce whereby the person injured is allowed to recover damages. The delict or wrongful act or omission of the carriers in this case was the violation of Section 8 in that such common carriers did or caused to be done an "Act, matter or thing in this act prohibited or declared to be unlawful."

(The words above quoted are from Sec. 8 of the Act to Regulate Commerce.)

Now, the plaintiffs in error maintain that without Section 8 there could be no recovery, and that the recovery of damages is not recovery of the difference between the rate found reasonable and the rate held unreasonable, but it is for damages resulting from the commercial effect of the assessment and collection of the tariff on the business activities of the defendant in error, and that when we show that it has had no appreciable commercial effect upon those business activities,

we have answered the claim of damages not by saying that you have secured your excess freight money from some other source, but that in the business of receiving from the manufacturer and delivering to the consumer motorcycles on which you paid a freight, you have been enabled to conduct that business in a way which fully discloses the business to have been undamaged.

What is the business of Ballou & Wright which is afforded the protection of Section 8 of the Act to Regulate Commerce in declaring a liability for damages sustained in consequence of the violation of any of the provisions of the Act to Regulate Commerce? It is not limited to the Act of paying over the counter of the carrier's freight house fifteen dollars freight on a motorcycle or any multiple thereof. Ballou & Wright's business is far greater and more extensive. That feature is but a small item. Ballou & Wright are distributors of motorcycles in certain limited trade areas. They are possessed of the right to buy and distribute in that area of all the motorcycles the trade will take. In exercising that right to so distribute machines we find that the machine is manufactured and placed upon the cars, transported to Portland, Oregon, sold to a consumer, delivered to him and taken out of the warehouse or storehouse of Ballou & Wright, and \$265 to \$300, whatever may be the price, is placed into the treasury of Ballou & Wright. In all these transactions there are contained in the \$265 or \$300 various elements:

- (a) The manufacturer's cost and profit.
- (b) The transportation cost and profit.
- (c) The distributor's profit.

Now, the testimony shows that the items "a" and "b" have not reduced in the slightest degree item "c," but that all have been included in the final transaction of a single item of business of Messrs. Ballou & Wright.

Now, we contend that in such situation Ballou & Wright have not been damaged, and that to adopt the principle contended for on page 19 *et seq.* of the brief of defendant in error would be to pervert the purpose for which the statute was enacted and would permit any intermediate shipper between the manufacturer and the consumer to make exactly the same recovery that Ballou & Wright claim, if any there be.

It is not every case wherein there is one intermediate delivery between the manufacturer and consumer as in the case of Ballou & Wright. The manufacturer at Armory, Massachusetts, may well sell to a jobber in Armory. The jobber in Armory may sell to a dealer in New York and the dealer in New York to another at Chicago, and so on, until the freight paid would merely be the locals applicable between such points, and which local rates from Armory to Portland would exceed the through rate.

Now, would it be contended that the recovery would be the difference between the amount of the sum of these local rates and the rate fixed by the Commission as reasonable. If not, why not, if the theory of the defendant in error is correct.

We contend that the damages recoverable under the Act to Regulate Commerce, or any particu-

lar section thereof, must be those which naturally flow from the transaction, and may be in favor of the manufacturer who was prevented by an excessive rate from extending a trade area, or from competing with a manufacturer whose factory was more favorably situated. It may be a distributor whose business has been affected injuriously by the rate; it may be a consumer who has been compelled to pay an excessive price for a given article which he otherwise would not have been compelled to pay, and that such recovery is not centered in or limited to the man who in the first instance draws his check in favor of the railroad company for the freight.

It may well be that Congress could have enacted a statute which would permit a shipper who had paid a rate subsequently found to be unreasonable, to recover the difference between such rate and the rate found reasonable, but it is a sufficient answer to the claim for such recovery that Congress has not so enacted. For these reasons we contend that the principle laid down by the insurance-negligence cases cited in the brief of the defendant in error are neither controlling, persuasive nor applicable.

DEFENDANT IN ERROR CLAIMS THAT BECAUSE THE FREIGHT WAS "PASSED ALONG" THE CARRIER IS NOT IN A POSITION TO CLAIM ANY BENEFIT BECAUSE THE SHIPPER HAS BEEN FULLY REIMBURSED.

Amplifying this contention and restating it, it is tantamount to a proposition that although they have so transacted their business whereby they

have not been damaged and whereby they have received the excess freight complained of from the consumer, that they are entitled also to recover the same amount again from the carrier.

C. F. Wright testified before the Interstate Commerce Commission (Transcript of Record p. 162) that the freight charges were paid upon these shipments by Ballou & Wright, and they were not charged back to the shipper. The point to be made from the testimony, that the freight charges were not charged back to the shipper, is that the consignor would not thereby have the right of action.

We submit that if the failure to charge the freight back to the shipper (consignor) cuts the consignor out of the cause of action under Section 8 of the Act to Regulate Commerce, why does not the charging of such freight forward to the purchaser also cut the consignee out of his right of action.

In the case of

Darnell-Taenzer Lumber Co. v. Southern Pacific, 221 Fed. Rep. 890,

the consignee charged the freight back to the lumber company, its consignor, and the lumber company by reason of that fact brought the action against the Southern Pacific, seeking to recover on account of all shipments for which such freight was charged back to them by the shipper.

If charging back the freight disposes of the cause of action of such consignee, we submit that by the same token and upon the same principle

of common justice to charge it forward accomplishes the same result.

UPON THE ARGUMENT, COUNSEL FOR DEFENDANT IN ERROR ADMITTED THAT DAMAGES RECOVERABLE UNDER SECTION 8 OF THE ACT TO REGULATE COMMERCE WAS NOT NECESSARILY MEASURED BY THE DIFFERENCE BETWEEN THE TWO RATES BY ASSERTING THAT SUCH DAMAGES MIGHT BE MORE THAN THE DIFFERENCE, BUT THEY CONTENDED THAT THE DAMAGES WOULD BE AT LEAST EQUAL TO SUCH DIFFERENCE.

We submit that the foregoing proposition is fatal to a contention that the measure of the damage is such difference. To restate the proposition in the reverse, if such damages may be more than such difference, it must follow that in certain cases it may be less. Furthermore, if such damages are more than the difference between such rates, how can the damages be so measured? It is submitted that the moment the defendant in error conceded that its damages in a given case might be more than the difference between the two rates multiplied by the quantity of the shipment, that they must also admit that no proper legal rule of measure was adopted by the trial court.

The argument of the defendant in error that the carriers are attempting to reduce the damages by showing Ballou & Wright passed along the excessive freight charges is fundamentally erroneous. We make no such contention. We say the damages if any which Ballou & Wright are entitled to recover are such that flow from the

commercial effect which the assessment and collection of the published rate had upon their business activities, and we offer the testimony that the freight was recollected by them, together with other and additional testimony; the sum total of which justifies the finding that they were not damaged, and hence cannot recover.

THE POINT WAS MADE THAT THE RAILWAY COMPANIES HAD CITED NO AUTHORITIES BUT THOSE ARISING FROM DISCRIMINATION CASES, AND ATTEMPT TO ANSWER OUR CONTENTION BY SAYING THAT THE COURTS OF LAST RESORT HAVE HELD THE RULE AS TO THE MEASURE OF DAMAGES IN DISCRIMINATION CASES AND EXCESSIVE RATE CASES, IS NOT NECESSARILY THE SAME.

It is true we have not cited a decision of the Supreme Court of the United States for the very simple reason that there is none, but we think our contention is impliedly adopted by the Supreme Court of the United States in the Meeker case.

When the case of Lehigh Valley R. R. Company v. Meeker was before the Circuit Court of Appeals, 211 Federal, that Court said at page 801:

“The Supreme Court also distinctly decides (speaking of the International Coal case) that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled.

No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered."

Now, the Supreme Court reversed this case on another point, 236 U. S. 412. We assert that a proper reading of the opinion of the Supreme Court of the United States in the Meeker case is an endorsement of the proposition laid down by the Circuit Court of Appeals to the effect, namely:

"No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered."

and the failure of the Supreme Court in reversing the case to disapprove of this doctrine amounts to an implied approval of the correctness thereof. In any event, we are left with the authority of the Circuit Court of Appeals for the Third Circuit as approving the doctrine we are contending for in this case. Moreover, the opinion of Judge McCall on demurrer to complaint in *Darnell-Taenzer Lumber Company v. Southern Pacific*, 190 Fed. p. 659 is a recognition of the correctness of this principle.

Mr. Justice Van DeVanter in the case of *Meeker v. Lehigh Valley* recognized the validity of our contention that the proof must support and the award represent the claimant's actual, pecuniary loss when he said in respect to the report of the Commission before the court in the Meeker case:

“The plain import of the findings is that the amounts expended represent the claimant’s actual, pecuniary loss.”

(See page 429). On the contrary, in this case the Commission does not nor does the lower court, nor does the counsel for the defendant in error claim that the amounts awarded represent Ballou & Wright’s actual pecuniary loss. In fact, it was argued before this court at the oral hearing, that such pecuniary loss might be more, but that it was at least equal to the award of the Commission.

The difference between the contentions of the carriers and that of the Commission and of counsel is marked and wide. The position of the Commission in the case at bar is that as a matter of law, even though the proof shows that the plaintiffs have shifted the burden of the excess to others, and, therefore, have not suffered any actual, pecuniary damage, yet the plaintiff in the court below was entitled to recover as a matter of law the difference between the rate found to be unreasonable by the Commission and the rate as finally fixed by such body.

The plain import of the findings in this case in the light of the evidence before the Commission and before the Court, is that the amount awarded does not represent the claimant’s actual pecuniary loss, and that the damages are to be measured in some other way than that adopted in this case in ascertaining such loss.

The Circuit Court of Appeals for the Third Circuit, in passing on the Meeker case was certainly preeminently correct in declaring that

proof of actual damage was just as necessary in unreasonably excessive rate cases as it was in discrimination cases, and that such difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, could not be made the measure of damage in one any more than in the other.

The argument that the Interstate Commerce Commission has adopted the measure approved by the court below and the citation of such adoption as persuasive authority and its approval in this court is not admissible, for that view is the subject of direct attack in this case.

On page 29 of respondent's brief a number of decisions of the Interstate Commerce Commission have been cited and a quotation is made from the case of *Burgess v. Transcontinental Freight Bureau*, 13 I. C. C. 668, and others. Stress is laid upon the argument of the Commission, that

"If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."

and for that reason they have undertaken to find a method of arriving at a damage notwithstanding such impossibility. The argument if unsound in one particular is certainly invalid in all.

The Supreme Court of the United States in the *International* case has disapproved of the proposition that because it was impossible to prove

damage that its recovery should be permitted anyhow. Even the Interstate Commerce Commission in speaking of such uncertainty of purpose in reparation cases, had this to say:

“An award of the Commission in reparation of damages resulting from a violation of the act to regulate commerce is not enforceable as such, but in a suit in court for such damages the findings and order of the Commission are *prima facie* evidence in support thereof. It follows that the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another.”

Anadarko Cotton Oil Co. v. A., T. & S. F. Ry. Co., 20 I. C. C. Rep. 43, 49.

No fault can be found with this principle. The award of damages should be made in no case except upon proof as certain and definite as would be required to support a final judgment or decree. The method adopted by the lower court is artificial and fictional and does not comply with such rule.

If, as counsel for defendant in error said at the argument, the damages suffered by his client may be more than that ascertained by the method adopted by the lower court, how can it be said that a complete measure has been applied in this case. In other words, the lower court has adopted a rule which fails to do complete justice. The rule is erroneous by the very fact of its failure to

fully measure the potential damage. Assuming there was testimony to prove such pecuniary loss, we have established its erroneous character. The testimony as was said in the Anadarko Cotton Oil case should be certain and definite to the extent required in support of a judgment at law.

The rule adopted by the lower court in the instant case fails to produce such certainty. There was neither proof nor measure of the actual pecuniary loss suffered by the defendant in error. On the other hand the affirmative testimony of the defendant disclosed it to have suffered no damage.

THERE SHOULD BE NO ADDITIONAL ATTORNEY'S FEES ALLOWED.

Ordinarily, we would not take exception to the allowance of attorney's fees in a proper case nor to the amount of the same. The decisions quoted on page 40 of counsel's brief appear to sustain the point contended for. In one of them additional attorney's fees were allowed in the Appellate Court, while in the other they were allowed in the *nisi prius* court. The amount involved in this case is between nine hundred and one thousand dollars. The lower court allowed five hundred dollars as attorney's fees and we made no contention on that point. We feel certain, however, that the attorney's fees allowed by the lower court were allowed in the sum of five hundred dollars on the theory that the case was going to be appealed, and that five hundred dollars would be indirectly compensation in the Cir-

cuit Court of Appeals. The bill of exceptions recites the following (Trans. 103):

“In addition to a consideration of the order of the Interstate Commerce Commission and the decision awarding reparation pleaded in the petition and admitted by the railroad companies to have been rendered, the petitioner offered the testimony of Mr. C. W. Fulton and Mr. Samuel White, attorneys of considerable and extended experience, whose testimony tended to show that a reasonable attorney’s fee, *in the event that petitioner should prevail*, was the sum of five hundred dollars (\$500.00). The petitioner then rested its case.”

The words of the statute under which attorney’s fees have been taxed are found in Section 16 of the Act and read as follows:

“If the petitioner shall finally prevail he shall be allowed a reasonable attorney’s fees to be taxed and collected as a part of the costs of the suit.”

We oppose the allowance of any additional attorney’s fees on two grounds:

1. There is no testimony in this record upon which the Court of Appeals can base a finding as to what would be a reasonable attorney’s fee.

2. The attorney’s fee already allowed by the lower court was based upon testimony tending to show that sum a reasonable amount “in the event that petitioner should prevail.”

The difference between the statute and the bill of exceptions is that the statute contains the word "finally." So take it altogether we assert that the compensation of attorneys if the event arises calling for the taxation of costs is handsomely fixed by the court below in a sum sufficient to compensate for the volume of work and labor done.

Respectfully submitted,

H. A. SCANDRETT,
ARTHUR C. SPENCER,
CHARLES E. COCHRAN,
Attorneys for Plaintiffs in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. F. DOANE,

Appellant,

VS.

CALIFORNIA LAND COMPANY, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Northern Division.

Filed

SEP 23 1916

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. F. DOANE,

Appellant,

vs.

CALIFORNIA LAND COMPANY, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Bill in Equity.....	9
Answer to Amended Bill in Equity.....	12
Attorneys, Names and Addresses of.....	1
Bill in Equity.....	3
Bond on Appeal.....	122
Citation on Appeal.....	1
Clerk's Certificate to Transcript on Appeal....	126
Conclusions of the Court on Final Hearing....	50
Decree.....	42

EXHIBITS:

Plaintiff's Exhibit "A" Attached to Answer to Amended Bill in Equity—Declara- tion of Trust.....	19
Plaintiff's Exhibit "B" Attached to Answer to Amended Bill in Equity—Agreement for Additional Time Within Which to Make Payments.....	32
Plaintiff's Exhibit "C" Attached to Answer to Amended Bill in Equity—Trustee's Deed	34

Index.	Page
EXHIBITS—Continued:	
Plaintiff's Exhibit "A"—Declaration of Trust.....	51
Plaintiff's Exhibit "B"—Agreement for Additional Time Within Which to Make Payment.....	64
Plaintiff's Exhibit "C"—Trustee's Deed..	68
Plaintiff's Exhibit "D"—Deed from John McMillan, H. N. Coffin and F. H. Parsons to California Land Company....	78
Defendant's Exhibit 1—Copy of Record in Superior Court, Fresno County, California, No. 18,871, F. F. Doane, Plaintiff, vs. Los Angeles Trust & Savings Bank et al., Defendants.....	85
Defendant's Exhibit 2—Copies of Notices of Rescission etc.....	100
Order Allowing Appeal and Fixing Bond.....	121
Order Extending Time to September 1, 1916, to File Record	128
Names and Addresses of Attorneys.....	1
Petition on Appeal and Assignment of Errors..	119
Praecipe for Transcript.....	125
Record of Enrollment.....	41
Stipulation as to Facts.....	45
Subpoena	6

Names and Addresses of Attorneys.

For Appellant:

G. R. FREEMAN, Esq., Corona, California.

For Appellee:

ALFRED A. FRASER, Esq., Boise City, Idaho,
and

H. G. REDWINE, Esq., Los Angeles, California.

[1*]

*In the United States District Court, in and for the
Southern District of California, Northern Divi-
sion.*

A-51—EQUITY.

CALIFORNIA LAND COMPANY,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Citation on Appeal.

United States of America.

The President of the United States to California
Land Company, a Corporation of Boise City,
State of Idaho, County of Ada, Greeting:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit in the City of San Fran-
cisco, State of California, on the 28th day of July,
1916, pursuant to an appeal duly obtained from a
decree of the District Court of the United States

*Page-number appearing at foot of page of original certified Record.

for the Southern District of California, Northern Division, wherein F. F. Doane, of Los Angeles, County of Los Angeles, State of California, is appellant, and you are appellee, to show cause, if any there be, why the said decree entered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable OSCAR A. TRIPPET, Judge of the District Court of the United States for the Southern District of California, Northern Division, this 28th day of June, 1916.

OSCAR A. TRIPPET,
United States District Judge. [2]

[Endorsed]: No. A-51—Equity. United States District Court, Southern District of California, Northern Division. California Land Co., Plaintiff and Appellee, vs. F. F. Doane, Defendant and Appellant. Citation on Appeal. Filed Jun. 28, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.

Received copy of within this the 28th day of June, 1916.

ALFRED A. FRASER,
H. G. REDWINE,
Attys. for Plff. [3]

*In the United States District Court, in and for the
Southern District of California, Northern Division.*

No. A-51—EQUITY.

CALIFORNIA LAND COMPANY,

Plaintiff,

vs.

F. F. DOANE,

Defendant. [4]

*In the District Court of the United States, Southern
Division of California, Northern Division.*

CALIFORNIA LAND CO.,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Bill in Equity.

To the Honorable Judges of the District Court of
the United States, in and for the Southern *Division*
of California, Northern Division:

The California Land Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho and a citizen of said State brings this its bill of *complaintant* against F. F. Doane, a citizen of the State of California, and a resident of the city of Los Angeles in the State of California, and in the Southern Division of the District of California. And for its cause of action, plaintiff states:

1.

That the amount in controversy herein exceeds the sum of \$3,000 exclusive of interest and costs.

2.

That the complainant is the owner in fee in the possession and entitled to the possession of the following described lands, to wit:

Sections Ten (10), Eleven (11), Twelve (12), Thirteen (13), Twenty (20), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), the North half of Section Twenty-eight (28), and all of Sections Thirty-four (34), Thirty-five (35), and Thirty-six (36), in township Twelve (12) South, Range Twelve (12) East, M. D. M.

Also, Section One (1), the North half of the Northeast Quarter, the North half of the Northwest Quarter; the South half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of Section Six (6), the South half of Section Eleven (11); all of Sections Twelve (12), Fifteen (15), Sixteen (16), [5] and Twenty-two (22); the Southwest Quarter of Section Thirty-three (33), and all of Section Thirty-four (34) in Township Thirteen (13) South, Range Twelve (12) East, M. D. M.

3.

That the defendant, F. F. Doane, claims an estate therein adverse to this complainant. That such claim is wholly unfounded and invalid in law or equity, and that its assertion depreciates the value of its title and property and prevents it from using or selling the property and otherwise harasses it

and annoys it in its possession and ownership. That the claim of said defendant is without any right whatever, and said defendant has no estate, right, title, or interest, whatever, in said lands or premises or any part thereof. That the claim of said defendant operates as, and is, a cloud upon the title of complainant to said land and premises, and causes complainant irreparable injury, and defendant threatens to continue, and does continue, to set up and claim said title to said land and premises adverse to this complainant.

Complainant therefore prays that the defendant may be required to answer but not under oath and to set forth the grounds and nature of his claims and pretensions, and that this court may determine each of them and that it may be adjudged that they are unfounded in law and equity, and that the complainant is the owner of premises and entitled to their possession, and for such other and further relief as may be just and equitable.

ALFRED A. FRASER,

Solicitor for *Complainant*, Residing at Boise City,
Idaho.

H. G. REDWINE,

Solicitor for Complainant, Residing at Los Angeles,
California.

CALIFORNIA LAND COMPANY,

By H. N. COFFIN,

President. [6]

State of Idaho,

County of Ada,—ss.

H. N. Coffin, being first duly sworn, says that he

is the president of California Land Company, the complainant herein; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that he believes the facts therein stated to be true.

(Signed) H. N. COFFIN.

Subscribed and sworn to before me this 15 day of February, 1916.

]Notarial Seal] (Signed) D. T. MILLER,

Notary Public for the State of Idaho. [7]

[Indorsed]: A-51—Eq. In the District Court of the United States, Southern *Division* of California, Northern Division. California Land Co., Plaintiff, vs. F. F. Doane, Defendant. Bill in Equity. Filed Feby. 21, 1916. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy Clerk. [8]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Northern Division.

IN EQUITY.

Subpoena.

The President of the United States of America,
Greeting: To F. F. Doane:

You are hereby commanded that you be and appear in said District Court of the United States aforesaid, at the courtroom in Fresno, California, on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a Bill of Complaint exhibited against you in said court by

the California Land Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho and a citizen of said State, and to do and received what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable BENJAMIN F. BLEDSOE, Judge of the District Court of the United States, this 21st day of February, in the year of our Lord one thousand nine hundred and sixteen, and of our Independence the one hundred and fortieth.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Seal U. S. District Court.]

MEMORANDUM PURSUANT TO RULE 12, OF
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES,
PROMULGATED BY THE SUPREME
COURT, NOVEMBER 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the clerk's office; which (except when court is in session) and a Judge present at Fresno) is at Los Angeles. Otherwise the Bill may be taken *pro confesso*.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk. [9]

To the Marshal of the United States for the Southern District of California:

Pursuant to Rule 12, the within subpoena is returnable into the clerk's office twenty days from the issuing thereof.

Subpoena issued February 21st, 1916.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

Stamped: Received 3:45 M., Feb. 21, 1916. U. S. Marshal's Office, Los Angeles, Cal. Marshal's Civil Docket No. 2969. [10]

United States Marshal's Office,
Southern District of California,—ss.

I hereby certify, that I received the within writ on the 28th day of February, 1916, and personally served the same on the 28th day of February, 1916, on F. F. Doane, by delivering to and leaving with F. F. Doane said defendant named therein, personally, at the County of Los Angeles, in said district, a copy thereof.

W. T. WALTON,
U. S. Marshal.
By E. L. Smith,
Deputy.

Los Angeles, Feb. 28, 1916. [11]

[Endorsed]: No. A-51—Equity. U. S. District Court, Southern District of California, Northern Division. In Equity. California Land Co. vs. F. F. Doane. Subpoena. Filed Feb. 29, 1916. Wm. M.

Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Eq. R. B. [12]

In the District Court of the United States, Southern Division of California, Northern Division.

CALIFORNIA LAND CO.,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Amended Bill in Equity.

To the Honorable Judges of the District Court of the United States, in and for the Southern *Division* of California, Northern Division:

The California Land Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho and a citizen of said state brings this its bill of complaint against F. F. Doane, a citizen of the State of California, and a resident of the city of Los Angeles in the *State California*, and in the southern division of the district of California. And for its cause of action, plaintiff states:

1.

That the amount in controversy herein exceeds the sum of \$3,000 exclusive of interest and costs.

2.

That the complainant is the owner in fee in the possession and entitled to the possession of the following described lands, to wit:

Sections Ten (10), Eleven (11), Twelve (12) Thirteen (13), Twenty (20), Twenty-two (22), Twenty-

three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), the North half of Section twenty-eight (28), and all of Sections Thirty-four (34), Thirty-five (35), and Thirty-six (36), in township Twelve (12) South, Range Twelve (12) East M. D. M. [13]

Also Section One (1), the North half of the Northeast Quarter, the North half of the Northwest Quarter; the South half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of Section Six (6); the South half of Section Eleven (11); all of Sections Twelve (12), Fifteen (15), Sixteen (16), and Twenty-two (22); the Southwest Quarter of Section Thirty-three (33) and all of Section Thirty-four (34) in Township Thirteen (13) South, Range Twelve (12) East, M. D. M. All in Fresno County, California.

3.

That the defendant, F. F. Doane, claims an estate therein adverse to this complainant. That such claim is wholly unfounded and invalid in law or equity, and that its assertion depreciates the value of its title and property and prevents it from using or selling the property and otherwise harasses and annoys it in its possession and ownership. That the claim of said defendant is without any right whatever, and said defendant has no estate, right, title, or interest whatever, in said lands or premises or any part thereof. That the claim of said defendant operates as, and is, a cloud upon the title of complainant to said land and premises and causes complainant

irreparable injury, and defendant threatens to continue, and does continue, to set up and claim said title to said land and premises adverse to this complainant.

Complainant, therefore, prays that the defendant may be required to answer, but not under oath, and to set forth the grounds and nature of his claims and pretensions, and that this [14] court may determine each of them and that it may be adjudged that they are unfounded in law and equity, and that the complainant is the owner of premises and entitled to their possession, and for such other and further relief as may be just and equitable.

ALFRED A. FRASER,
Solicitor for Complainant, Residing at Boise City,
Idaho.

H. G. REDWINE,
Solicitor for Complainant, Residing at Los Angeles,
Cal.

CALIFORNIA LAND CO.

H. N. COFFIN,
President. [15]

State of Idaho,
County of Ada,—ss.

H. N. Coffin, being first duly sworn, says that he is the president of California Land Company, the complainant herein; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that he believes the facts therein stated to be true.

(Signed) H. N. COFFIN.

Subscribed and sworn to before me this 28 day of February, 1916.

[Notarial Seal] (Signed) D. T. MILLER,
Notary Public for the State of Idaho. [16]

[Indorsed]: A-51—Eq. In the District Court of the United States, Southern *Division* of California, Northern Division. California Land Company, Plaintiff, vs. F. F. Doane, Defendant. Amended Bill in Equity. Filed Mar. 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [17]

*In the District Court of the United States, Southern
District of California, Northern Division.*

CALIFORNIA LAND CO.,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Answer to Amended Bill in Equity.

Now comes the defendant F. F. Doane, and now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to any or all error, uncertainties and other imperfections in said Amended Bill contained, and also objections to the jurisdiction of said court, does hereby answer thereunto or to so much of such parts of said Amended Bill as this defendant is advised it is material or necessary for him to make answer, and for his answer herein.

Admits that the California Land Company is a

corporation organized and existing under and by virtue of the laws of the State of Idaho, and a citizen of said state;

Admits that F. F. Doene is a citizen of the State of California and a resident of the City of Los Angeles, Los Angeles County in State of California, but alleges that he is within the Southern Division of the Southern District of the District Court of the United States for the State of California; [18]

I.

Denies that the complainant is the owner in fee or in the possession or entitled to the possession of the said lands described in complainant's amended bill, but alleges that the said title is held by the Los Angeles Trust and Savings Bank, a corporation, of Los Angeles, California, as security for the payment to H. N. Coffin, F. H. Parsons and John McMillan, as trustee, and the predecessors in interest of the said complainant herein, for the sum of \$379,000 with interest, upon which sum there has been paid the sum of \$169,580 as principal and interest by this defendant, and said property is held for the purposes set forth in that certain instrument in writing bearing date the 14th day of August, 1914, executed by the said Los Angeles Trust and Savings Bank, and the said H. N. Coffin, F. H. Parsons and John McMillan as trustees, and said F. F. Doane, herein, a copy of which agreement is hereto attached marked exhibit "A" and made a part hereof, which said agreement is still in force and effect; that by the terms of said agreement this defendant has an interest in said lands by reason of the payment of the

said sum of \$169,580 as part of the purchase price for said property, and the said plaintiff herein has a lien upon said property for the payment of the balance of the said purchase price.

II.

Admits he claims an estate in said land adverse to complainant; denies said claim is wholly unfounded or invalid in law or equity or law and equity; denies that the defendant's claim depreciates the value of plaintiff's title or property or prevents it from using or selling or using and selling the property or otherwise harasses or annoys it in its possession or ownership, other than the rights to purchase which have heretofore been granted to defendant through and under said [19] agreement marked exhibit "A" hereto attached; denies that said claim is without any right whatever; denies that the defendant has no estate or right or title or interest in said lands or premises or lands and premises, or any part thereof; denies that the said claim of the said defendant operates as or is a cloud upon the title of the complainant to said lands or premises or that it causes complainant irreparable injury or any injury whatever; but alleges that defendant does claim an interest in said property and title as hereinbefore set forth. [20]

Plaintiff for a further defense alleges:

I.

That on the 26th day of November, 1915, the defendant herein commenced an action in the Superior Court of the State of California in and for the County of Fresno, against H. N. Coffin, John McMillan and F. H. Parsons, as trustees, and H. N.

Coffin, John McMillan and F. H. Parsons, and the Los Angeles Trust and Savings Bank, a corporation, as defendants, which said action is now pending.

II.

That the said Los Angeles Trust and Savings Bank, a corporation, one of the defendants in said suit in said State Court, is a corporation organized and existing under the laws of the State of California, with its principal place of business at Los Angeles, California, and said corporation is a citizen of the State of California.

III.

That said cause of action in said state court involves the construction of certain instrument in writing hereto annexed marked exhibit "A," and made a part hereof, and was brought for the purpose of establishing said F. F. Doane's interest and claim in said lands described in plaintiff's amended bill herein.

That the said Los Angeles Trust & Savings Bank have appeared in said action on or about the 23d day of December, 1915.

IV.

That the said H. N. Coffin, F. H. Parsons and John McMillan and their associates in interest knew of said action in said state court aforesaid immediately upon said suit being filed in said court; and on the 29th day of December, 1915, there was filed by said F. F. Doane a *lis pendens* in said action with the [21] County Recorder of Fresno County, California, a copy of which *lis pendens* is hereto attached marked exhibit "B" and made a part hereof.

V.

That on the 30th day of December, 1915, the said H. N. Coffin, F. H. Parsons and John McMillan and their associates in interest in said lands formed the corporation plaintiff herein under the laws of the State of Idaho, a copy of which articles of incorporation is hereto attached marked exhibit "C" and made a part hereof.

VI.

That the said H. N. Coffin, F. H. Parsons and John McMillan immediately filed said Articles of Incorporation with the Secretary of State of Idaho, to wit, on the 8th day of January, 1916, and on the 17th day of February, 1916, filed a certified copy thereof with the Secretary of State of California, and on the 3d day of March, 1916, filed a certified copy thereof with the county clerk of Fresno County, California, and on the 17th day of February, 1916, filed with the Secretary of State of California a designation of the person upon whom service of process may be made in California designating H. G. Redwine of Los Angeles, California, as such person;

VII.

That said corporation plaintiff herein was formed for the purpose of removing the issue involved in said cause of action pending in said Superior Court of Fresno County, California, to the United States District Court, and to have the same issues tried in said District Court relative to the rights of the respective parties in said lands described in the plaintiff's Amended Bill herein. [22]

VIII.

That said corporation plaintiff herein is the agent of the real parties in interest, to wit, H. N. Coffin, F. H. Parsons and John McMillan and their associates in interest in said lands, and that no adequate consideration was given by said corporation for transferring the interests of the said H. N. Coffin, F. H. Parsons and John McMillan and the others to said corporation, or any consideration other than the issuing of its capital stock to the said H. N. Coffin, F. H. Parsons and John McMillan and their associates.

IX.

That such transfer of interests in said land by said H. N. Coffin, F. H. Parsons, John McMillan and others was made for the purpose of transferring the same issues in the said state court then and now pending to the United States District Court;

That the said issues and claims of said F. F. Doane were well known by said H. N. Coffin, F. H. Parsons and John McMillan prior to the formation of said corporation and the claim of said F. F. Doane to his interest in said lands described in said Amended Bill herein were all based upon and grew out of contracts with said H. N. Coffin, F. H. Parsons and John McMillan, which contracts and rights and claims were well known to said H. N. Coffin, F. H. Parsons and John McMillan prior to the formation of said corporation plaintiff herein.

X.

That said corporation plaintiff is owned and con-

trolled by the same parties named as defendants in said action in said state court with the exception of the Los Angeles Trust and Savings Bank, a corporation, which latter corporation was at all times acting as the agent of the parties to this action and the action in said state court. [23]

WHEREFORE, defendant prays that the complainant take nothing, and that the action be dismissed; and

That if it be determined that this court has jurisdiction that it be adjudged that the defendant has an interest in said premises as purchaser and entitled to their possession, and for such other and further relief as may be just and equitable.

G. R. FREEMAN,

Solicitor for Defendant, Residing at Corona, California.

State of California,

County of Los Angeles,—ss.

F. F. Doane, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated in information or belief, and as to those matters he believes it to be true.

(Signed) F. F. DOANE.

Subscribed and sworn to before me this 18th day of March, 1916.

[Notarial Seal]

(Signed) MAE L. GORDON,
Notary Public in and for said County and State.
[24]

**Plaintiff's Exhibit "A"—Declaration of Trust
Attached to Amended Bill in Equity.**

DECLARATION OF TRUST.

WHEREAS, heretofore, to wit, on or about the 25th day of February, 1913, there was conveyed to the LOS ANGELES TRUST & SAVINGS BANK, a corporation, the following real property, situate in the County of Fresno, State of California, described as follows:

Sections Ten (10), Eleven (11), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Twenty (20), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), the North half of Section Twenty-eight (28), and all of Sections Thirty-four (34), Thirty-five (35) and Thirty-six (36), in Township Twelve (12) South, Range Twelve (12) East, M. D. M. Also Section One (1), the North half of the Northeast Quarter, the North half of the Northwest quarter; the South half of the Southeast quarter and the Southeast quarter of the Southwest quarter of Section Six (6); the South half of Section Eleven (11); all of Sections Twelve, Fifteen (15), Sixteen (16) and Twenty-two (22); the Southwest quarter of Section Thirty-three (33) and all of Sec-

tion Thirty-four (34) in Township Thirteen (13) South, range Twelve (12), M. D. M.

Excepting therefrom a strip of land Two Hundred (200) feet in width, being One hundred (100) feet on each side of the center line of the Canal known as the San Joaquin and Kings River Canal and Irrigation Company's Outside Canal, as the same is or shall be finally located through and across Section Twelve (12) and the North half of Sections [25] Ten (10) and Eleven (11), in Township Twelve (12) South, Range Twelve (12) East, viz.: Beginning at a point on Eastern boundary of the Southeast Quarter of said Section Twelve (12); thence in a Northwesterly direction through said Section to a point on the Western boundary of its Northwest Quarter; thence in a Northwesterly direction through the North half of Section Nine (9), Ten (10) and Eleven (11), to a point in Section Nine (9) near the middle of the North boundary thereof; as conveyed to the said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by Henry Miller et al., by deed recorded in Book 201, page 164 of Deeds, hereinbefore recited.

SUBJECT TO:

1st. Taxes for fiscal year 1913-1914.

2d. An easement for road purposes over a strip of land sixty (60) feet wide lying equally on each side of the center of the located line of the Fresno Flats and Panoche Road; located on parts of Sections Twenty-five (25), Twenty-six (26), Twenty-seven (27), Thirty-four (34), Thirty-five (35) and Thirty-six (36) in Township Twelve (12) South,

range Twelve (12) East, according to the official survey and map filed with the Board of Supervisors of the County of Fresno, March 1st, 1886; as conveyed by Henry Miller and Charles Lux to the County of Fresno by deed recorded May 5, 1886, in Book 47, page 638 of Deeds, Records of said County of Fresno.

3d. An *eastment* for road purposes over those portions of Sections One (1), Six (6) and Twelve (12), in Township Thirteen (13) South, Range Twelve (12) East, embraced within the lines of the Henry Miller Road," being thirty (30) feet on each side of a line that runs from the Southeast corner [26] corner of said Section One (1) to the Southeast corner of Section Six (6); thence South to the Southeast corner of Section Seven (7), of said Township and Range, and thence West to the Southwest corner of said Section Seven (7) as conveyed, in part, by Henry Miller to the County of Fresno by deed recorded March 30th, 1890, in Book 144, page 141 of Deeds, Records of said County.

4th. An *eastment* for road purposes over those portions of said property embraced within the lines of the "Russell Road," which comprises a strip of land Sixty (60) feet wide, the center line of which begins at the Southeast corner of Section Twenty-five (25), Township Twelve (12) South, Range Twelve (12) East, and runs west to the southwest corner of Section Twenty-seven (27), said Township and Range; and thence North to the Northwest corner of Section Three (3) of said Township and Range, as conveyed in part by Jesse S. Potter, Ex-

ecutor, etc. to the County of Fresno, by deed recorded in Book 219, page 4 of Deeds, Records of said County.

5th. Right of Way through and over the lands owned by Henry Miller and Charles Lux on February 7th, 1872, to wit: Sections Ten (10) to Fifteen (15), inclusive, Twenty-two (22) to Twenty-five inclusive, Thirty-six (36) and the North half of Section Twenty-six (26), Township Twelve (12) South, Range twelve (12) East, and Section One (1) and the North half of Section Twelve (12), Township Thirteen (13) South, Range Twelve (12) East, for any and all canal and canals which were already laid at said date, or shall thereafter be constructed by the San Joaquin and Kings River Canal and Irrigation Company, for irrigation [27] or navigation, and to construct, maintain, keep in repair and operate the same, and for tow-paths and other necessary appurtenances to such canals with the right to pass and repass over and upon adjacent land of said Miller and Lux for such purposes; as conveyed by the said Miller and Lux to said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by deed recorded in Book "C," page 254, of Covenants, Records of said County of Fresno.

6. Right of way for and right to maintain, over and upon the lands adjacent to the two hundred (200) foot strip of land hereinafter recited, any and all necessary and proper distributing ditches and water courses connecting with and leading from the canal constructed on said two hundred (200) foot strip of land; also the right to pass and repass over

said adjacent lands with men, teams and otherwise, with materials as may be necessary for the repair, maintenance and operation of said canal; as conveyed by Henry Miller et al. to the San Joaquin and Kings River Canal and Irrigation Company, a Corporation, by deed recorded in Book 201, page 164 of Deeds, Records of said County of Fresno.

WHEREAS, the said conveyance to the Los Angeles Trust and Savings Bank is absolute in form and purports to convey to said bank the absolute, legal and equitable title to all of said property, subject to the easements and rights of way hereinbefore mentioned, nevertheless the said deed and grant are intended to convey said property to said bank for the benefit of those certain persons hereinafter named and designated as beneficiaries and whose respective interests are hereinafter set up; and [28]

WHEREAS, said Los Angeles Trust & Savings Bank paid no consideration for said property, and has no interest therein, except as hereinafter stated,

NOW, THEREFORE, this Declaration of Trust

WITNESSETH:

That the said Los Angeles Trust & Savings Bank, hereinafter referred to as Trustee, hereby certifies and declares that it holds and shall hold all the interest acquired in said real property hereinbefore described, under and by virtue of said conveyance in trust upon the following terms and conditions:

First. To secure to H. N. Coffin, John McMillan and F. H. Parsons, Trustees, hereinafter known as "payees," the sum of Three Hundred Seventy-nine

Thousand (\$379,000) Dollars, with interest, which sum shall be payable as follows:

Twenty Thousand (\$20,000) Dollars on or before January 1st, 1913;

Fifty-five Thousand (\$55,000) Dollars on or before March 1st, 1913;

Twenty-five Thousand (\$25,000) Dollars on March 1st, 1914;

Ninety-three Thousand (\$93,000) Dollars on March 1st, 1915;

Ninety-three Thousand (\$93,000) Dollars on March 1st, 1916;

Ninety-three Thousand (\$93,000) Dollars on March 1st, 1917;

—with interest on each installment from March 1st, 1913, until the sum is paid, at the rate of six per cent per annum, payable semi-annually from March 1st, 1913. [29]

Second. After said property is released to F. F. Doane, in accordance with the terms of this Declaration, to sell the same as instructed by the said F. F. Doane, in accordance with the maps of said property attached to Certificate of Title No. 357,692 issued by the Title Insurance & Trust Company of Los Angeles, California, covering the property herein described, it being understood that the said trustee shall issue and execute all contracts of sale and deeds for any part or parcel of said property, that said contracts of sale shall prescribe the amount and time of payment of the purchase price thereunder, and said contracts shall further give the name of the purchaser or purchasers of said property and

shall contain all restrictions and conditions affecting said property contracted to be sold.

Third. The Trustee shall not be called upon to make any improvement on said property, but the improvements thereon shall be paid for by F. F. Doane, who promises and agrees to hold the said Trustee free and harmless from liens, claims, demands, charges and expenses by reason of any improvement or improvements made or contracted to be made by them.

Fourth. The said Trustee shall receive all moneys realized from the sale of said property, and shall distribute the same as follows:

1st. To the payment of itself of its compensation which is hereupon agreed to be one-tenth of one per cent (1%) of the actual sale price on said property, for drawing and execution of this Declaration and the acceptance of this trust: Two (\$2) Dollars for each contract, each deed, or any other instrument in writing executed by the Trustee, and one per cent of all moneys coming into its possession or under its control under the terms of this Declaration of Trust, together with necessary expense incurred in the administration of this trust, including costs of certificates of title, and reasonable compensation of all extraordinary services rendered in the execution of this [30] trust. Provided, however, that the Payees nor their interest or the interest of any person whom they represent in said land shall be liable for any expense costs or fees of the said Trustee. Nor shall said Trustee be entitled to any lien upon said land or any part thereof superior to the lien of

said payees for the balance of the purchase price and interest thereon. But in case said F. F. Doane or his executors, administrators or assigns should make default in the payments upon his part to be made and said Trustee under the terms of this declaration of trust should proceed to foreclose said F. F. Doane or his assigns in the manner herein provided for, then and in that event, said payees agree to pay said trustee in full payment for such services of foreclosure and sale, the sum of not to exceed One Thousand Dollars, and the costs of advertising said lands for sale.

2d. To the payment of taxes on the property not payable by any of the purchasers thereof.

3d. To the payment to the payees the sum of Three Hundred Seventy-nine Thousand (\$379,000) Dollars, with interest, in installments and at the times as hereinabove set forth.

4th. The balance of the moneys remaining on hand shall be held subject to the order of F. F. Doane.

Fifth. The parties to this trust are as follows:

H. N. Coffin, John McMillan and F. H. Parsons, otherwise known as the Payees;

F. F. Doane, otherwise known as the Beneficiary.

Sixth. In the event that the said F. F. Doane shall fail to pay or cause to be paid to the Trustees sufficient moneys in accordance with the terms of this trust, to enable said Trustee [31] to meet the payments due to the payees under this trust at the times and in the amounts hereinbefore set forth, then

on demand of said payees or assigns, and without demand by the said Trustee for the payment of any of said sums, the said Trustee shall sell the above granted property or such parts thereof as it shall deem necessary to sell to accomplish the objects of this trust. Such demand for sale by the payee shall be deemed conclusive notice of an election to declare the whole amount of the principal purchase price and interest immediately payable, to which power of election the said F. F. Doane hereby agrees. Said sales shall be made as follows: The said Trustee shall publish notice of the time and place of such sale, with a description of the property to be sold, at least once a week for four successive weeks in some newspaper published in Los Angeles County, California, and may postpone such sale by public announcement at the time and place of sale so advertised, but such postponement shall not exceed ten days; and on the day of sale so advertised, or on the day to which such sale may be postponed, said Trustee may sell said property or any portion thereof at public auction at any place in Los Angeles, California, to the highest bidder for cash in lawful money, and the payees hereunder may purchase at such sale. Such sale may be made by any officer of the Trustee authorized by it to conduct similar sales. Upon such sale said Trustee shall execute and deliver to the purchaser a deed to the property sold without any covenants, and from the proceeds shall pay:

1st. Expenses of such sale, and the compensation to the Trustee, in accordance with the terms hereinabove set forth;

2d. To the payees hereunder the amount unpaid on the said purchase price, with accrued interest;

3d. The balance of such proceeds to the order of F. F. Doane. [32]

In the event of sale of said property or any part thereof, and execution of a deed therefor under these trusts, then the recitals therein of any default in payments, publication of notice of sale, demand that sale should be made, postponement of sale, terms of sale, sale, purchaser, payment of purchase money, and of any other fact or facts affecting the regularity or validity of such sale, shall be conclusive proof of such matters and of all other facts recited therein against said F. F. Doane and all other persons; and the receipt for the purchase money contained in such deed shall discharge the said purchaser from all obligation to see to the proper application of the purchase money. Every stipulation herein shall inure to the benefit of the successors and assigns of the respective parties hereto.

Seventh. It is further agreed that any of the above described lands in half sections, and not less than one-half section at a time, may be released to F. F. Doane from under the lien of the purchase price due the payees under this trust, upon the payees receiving payment therefor in the sum of Ten Thousand (\$10,000) Dollars for each half section so released, excepting the first half section to be released, the release price on which shall be Ninety-six Hundred (\$9,600) Dollars, and that all moneys received for lands so released shall be applied in payment, so far as the same may be, to the next installment there-

after falling due under the terms of payment hereinabove set forth, provided, however, that this provision as to the release of any of said lands shall not apply nor be in force or effect until after said payments of Twenty Thousand (\$20,000) Dollars and Fifty-five Thousand (\$55,000) Dollars first due hereunder shall have been made. [33]

Eighth. It is further agreed that the personal property now located and now used in connection with the above described property, consisting of horses, wagons and general farming machinery, shall be turned over to the possession of the said beneficiary, at the time said beneficiary shall take possession of said property, to be used by said beneficiary and his assigns during the life of this trust, and in the event that the conditions and provisions of this trust and the purchase price of said property shall be fully met by the beneficiary, then and in that event the title to said personal property shall vest in said beneficiary, but in the event of the default of the payment of the purchase price and sale by Trustee under said default, said personal property shall be subject to the same terms of sale as the real property held hereunder, and in fact shall go with the realty when deeded.

Ninth. The said payees and beneficiary shall jointly and severally indemnify and save harmless the Trustee hereunder from any and all liabilities, claims, demands, injuries or damages which it may suffer or sustain by reason of the acceptance of this trust or its position as Trustee hereunder. That said Trustee shall not be called upon to appear in or

defend any suit or suits with reference to said property or growing out of any improvements made thereon, or to take any action as to said property, other than as provided herein, but that the said beneficiary shall appear in and defend any such suit or suits brought with reference to said property or growing out of this trust.

Tenth. The Trustee shall be paid for all extraordinary services rendered in the execution of this trust by the beneficiary, in addition to the compensation hereinbefore provided, and shall have a lien on all of the trust property to secure the same, subject to the lien of the payees, and this trust shall not cease or terminate in any event until all the costs, fees and expenses of said Trustee shall have been fully paid. [34]

Eleventh. It is understood that the said Trustee makes no representation of fact as to the title of the property hereinbefore described, but has the right to assume that the Guaranty Certificate of the Title Insurance & Trust Company No. 357692, correctly shows the record title to said property and the encumbrances thereon; and it shall not be the duty of the said Trustee, but it shall be the duty of the said beneficiary, to pay all taxes, assessments, mortgages, liens and encumbrances now on said property or that may hereafter be assessed or levied thereon by any taxing power or governmental authority, and all mortgages, liens or other encumbrances hereafter placed thereon by the said beneficiary or by any other person at his request.

The conditions and provisions hereof shall inure

to and bind the heirs, legatees, devisees, administrators, executors, successors, and assigns of all the parties hereto, provided, however, that no assignment of any interest in said property or in said trust or under the terms hereof shall be binding upon the Trustee, or shall be construed as notice to said Trustee, unless such assignment is in writing signed by the person transferring his interest and acknowledged before a notary public, and also accepted in writing by the assignee to whom such assignment is made, and delivered to said Trustee.

IN WITNESS WHEREOF, THE LOS ANGELES TRUST & SAVINGS BANK has caused these presents to be executed in its corporate name by its Vice-President and Assistant Secretary, and its corporate seal to be hereto affixed, this 14th day of August, 1914.

LOS ANGELES TRUST & SAVINGS
BANK.

[Corporate Seal]

By W. R. HERVEY,
Vice-President.

By B. H. GRIGSBY,
Assistant Secretary. [35]

We, the undersigned, do hereby certify and declare that the above and foregoing Declaration of Trust correctly and accurately states and declares the trusts under and by which the property described in said Declaration of Trust is held by the Los Angeles Trust & Savings Bank, as Trustee, and that the same correctly sets forth and declares our respective interests therein, and we hereby ratify and confirm

the same in all its particulars in accordance with the conditions and stipulations therein expressed.

(Signed) H. N. COFFIN,
F. H. PARSONS,
JOHN McMILLAN,
Trustees.

(Signed) F. F. DOANE. [36]

Plaintiff's Exhibit "B"—Agreement for Additional Time Within Which to Make Payments Attached to Amended Bill in Equity.

In the Superior Court of the State of California, in and for the County of Fresno.

F. F. DOANE,

Plaintiff,

vs.

LOS ANGELES TRUST & SAVINGS BANK, a Corporation, H. N. COFFIN, JOHN McMILLAN and F. H. PARSONS, as Trustees; H. N. COFFIN, JOHN McMILLAN, and F. H. PARSONS et al.,

Defendants.

Notice is hereby given, that an action has been commenced in the Superior Court of the County of Fresno, State of California, by the above-named plaintiff against the above-named defendants, to have the deed executed by H. N. Coffin, McMillan and F. H. Parsons purporting to convey the hereinafter described property to the Los Angeles Trust & Savings Bank, declared a mortgage.

The premises affected by this suit are situated in

the County of Fresno, State of California, and particularly described as follows:

Sections 10, 11, 12, 13, 20, 22, 23, 24, 25, 26, 27 and the north half of section 28, all of sections 34, 35, and 36 in Township 12 south, range 12 east, M. D. M.

Also, section 1, north half of northeast quarter; north half of the northwest quarter; south half of the southeast quarter, and southeast quarter of southwest quarter, of section 6; the south half of section 11; all of sections 12, 15, 16 and 22, the southwest quarter of section 33; all of section 34; in township 13 south, range 12 east, M. D. M. [37]

Excepting therefrom a strip of land 200 feet in width as finally located through and across section 12, and north half of sections 10 and 11, in township 12 south, range 12 east, as conveyed to the San Joaquin and Kings River Canal and Irrigation Company, a corporation, by Henry Miller et al., by deed recorded in Book 201, page 164 of Deeds, Fresno County, Calif.

Dated this 23 day of December, 1915.

G. R. FREEMAN,
Attorney for Plaintiff.

Filed for record at the request of G. R. Freeman, Dec. 29, A. D. 1915, at 25 min. past 10 o'clock A. M., and recorded in Vol. 10.) of *Lis Pendens*, pg. 382, Fresno County Records. F. N. Barstow, County Recorder. By R. A. Fleshner, Deputy Recorder. 4/100. [38]

**Plaintiff's Exhibit "C"—Trustee's Deed Attached to
Amended Bill in Equity.**

FRANK C. JORDAN,

Secretary of State.

FRANK H. CORY,

Deputy.

STATE OF CALIFORNIA.

DEPARTMENT OF STATE.

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of California Land Company with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. I further certify that this authentication is in due form and by the proper officer.

IN WITNESS WHEREOF, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 18th day of February, A. D. 1916.

[Great Seal of the State of California.] [39]

FRANK C. JORDAN,

Secretary of State.

By Frank H. Cory,

Deputy.

CERTIFICATE OF CERTIFIED COPY.

STATE OF IDAHO.

DEPARTMENT OF STATE.

I, George R. Barker, Secretary of State of the State of Idaho, do hereby certify that the annexed is a

full, true and complete transcript of a certified copy of Articles of Incorporation of the California Land Company which was filed in this office on the eighth day of January, A. D. 1916, and admitted to record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State. Done at Boise City the Capital of Idaho, this seventh day of February, in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the United States of America, the one hundred and fortieth.

[Seal]

GEORGE R. BARKER,

Secretary of State.

(10¢ U. S. I. R. Stamp. Cancelled.) [40]

ARTICLES OF INCORPORATION.

of the

CALIFORNIA LAND COMPANY.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, have this day voluntarily associated ourselves for the purpose of forming a corporation under the laws of the State of Idaho, AND WE CERTIFY:

First. That the name of said corporation is CALIFORNIA LAND COMPANY.

Second. That the purposes for which it is formed are: To acquire by purchase, lease, own, hold, sell, mortgage, or encumber both improved and unimproved real estate wherever situated; to survey, subdivide, plat and improve the same for the purposes of sale or otherwise; to construct and erect houses or other buildings thereon and operate the same; to prospect for and develop artesian wells on the prop-

erty of the corporation for the purpose of irrigation, power and domestic use; to acquire by purchase, lease, location or otherwise, water and water rights for irrigation of the lands of the corporation; to farm, graze or cultivate said lands or any of them; to issue bonds, stock, promissory notes and other evidences of indebtedness, and to secure the same by mortgage, deed of trust, or in any other manner authorized by the Board of Directors of said corporation; and to do all other things necessary to carry out the object and purposes of the corporation.

Third. The place where the principal business of the corporation is to be transacted shall be at Boise City in the County of Ada, State of Idaho.

Fourth. That the term for which it is to exist is fifty years from and after the date of its incorporation. [41]

Fifth. That the number of its directors shall be five.

Sixth. That the amount of the capital stock of this corporation shall be One Hundred Thousand Dollars, divided into One Thousand shares of the par value of One Hundred Dollars each.

Seventh. That the amount of said capital stock which has been actually subscribed is Three Hundred Dollars, and the names of the persons by whom the same has been subscribed are:

Name of Subscriber.	No. of Shares.	Amount
H. N. Coffin,	One	100
F. H. Parsons,	One	100
John McMillan,	One	100

IN WITNESS WHEREOF, we have hereunto set

out hands and seals this 30th day of December, 1915.

H. N. COFFIN,

F. H. PARSONS,

JOHN McMILLAN.

State of Idaho,

County of Ada,—ss.

I, Mont. P. Meholin, a Notary Public in and for said county and state, do hereby certify that H. N. Coffin, F. H. Parsons & John McMillan whose named are sibned to the foregoing instrument and who are known to me, have acknowledged before me this day that being informed of the contents of said instrument, they have voluntarily executed the same, severally, on the day the same bears date.

Given under my hand this 30th day of December, 1915.

[Seal]

MONT. P. MEHOLIN,

Notary Public for Idaho, Res. Boise, Ida. [42]

CERTIFICATE.

State of Idaho,

County of Ada,—ss.

I, Stephen Utter, Ex-officio Recorder in and for Ada County, State of Idaho, do hereby certify that the annexed is a full, true and correct copy of certain Articles of Incorporation of California Land Company Numbered 1821 as the same appears in my office.

IN TESTIMONY WHEREOF, I have hereunto

set my hand and affixed my official seal this 8th day of January, 1916.

[Seal]

STEPHEN UTTER,
Ex-officio Recorder.
By Frances Wood,
Deputy.

[Ten Cent Revenue Stamp Attached and Cancelled.]

[Endorsed]: #1821. Articles of Incorporation of California Land Company. [43]

State of Idaho,
County of Ada,—ss.

I hereby certify that this instrument was filed for record at request of A. A. Fraser at 20 minutes past 2 o'clock P. M. this 8th day of Jany. 1916, in my office, and duly recorded in Book — of — page —.

Fees 50¢.

STEPHEN UTTER,
Ex-officio Recorder.
By Frances Wood,
Deputy.

10879.

CERTIFIED COPY OF THE ARTICLES OF INCORPORATION OF CALIFORNIA LAND COMPANY.

DEPARTMENT OF STATE, Secretary's Office.

Filed this 8th day of Jan. 1916, at 2.45 o'clock P. M. and Recorded in Book A-7 of Dom. Corps., on

page 162. Records of the State of Idaho.

[Seal]

GEORGE R. BARKER,

Secretary of State.

By B. E. Hyatt,

Chief Clerk.

[Endorsed]: Filed in the office of the Secretary of State of the State of California, Feb. 17, 1916.

FRANK C. JORDAN,

Secretary of State.

By Frank H. Cory,

Deputy.

[Endorsed]: No. 416-C. Filed in the office of the County Clerk of Fresno County, California, this 3d day of March, 1916. D. M. Barnwell, County Clerk. By E. Dusenberry, Deputy. [44]

State of California,
County of Fresno,—ss.

I, D. M. Barnwell, County Clerk and ex-officio clerk of the Superior Court in and for said Fresno County, do hereby certify the foregoing to be a full, true and correct copy of a Certified Copy of the Articles of Incorporation of the "California Land Company," now on file in my office, and of the whole of such original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Superior Court, this 7th day of March, 1916.

[Seal] D. M. BARNWELL,
County Clerk and Ex-officio Clerk of the Superior
Court of said County.

By E. Dusenberry,
Deputy Clerk.

[Ten Cent Revenue Stamp Attached and Cancelled.] [45]

[Endorsed]: No. A-51—Equity. United States District Court, State of California, Southern District, Northern Division. California Land Co., Plaintiff, v. F. F. Doane, Defendant. Answer. Service of the Within Admitted this 18th day of March, 1916. H. G. Redwine & Alfred A. Fraser, Attorneys for *Complaints*. Filed March 18, 1916, Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. G. R. Freeman, Attorney at Law, Corona, California, Attorney for Defendant. [46]

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division.*

No. A-51—EQUITY.

CALIFORNIA LAND COMPANY, a Corporation,
Complainant,

vs.

F. F. DOANE,

Defendant.

Record of Enrollment.

On the 21st day of February, 1916, the complainant filed herein its Bill of Complaint, which is hereto annexed;

Thereupon, on said 21st day of February, 1916, a subpoena ad respondendum issued herein, returnable as provided by law, which is hereto annexed;

On the 1st day of March, 1916, the complainant filed herein an Amended Bill of Complaint, which is hereto annexed;

On the 18th day of March, 1916, the defendant filed herein an Answer to the Amended Bill of Complaint, which is hereto annexed;

On the 1st day of May, 1916, this cause came on to be heard in open court upon the pleadings and proofs, and was heard by the Court, on said 1st day of May, 1916, and on the following day, and was, on the 2d day of May, 1916, submitted to the Court for its consideration and decision; and thereafter, on the 15th day of May, 1916, the Court handed down its Opinion, which was filed in open court, and ordered that a Decree be entered herein, and accordingly, on said 15th day of May, 1916, a Decree was signed, filed, entered and recorded herein, and is hereto annexed. [47]

*In the District Court of the United States, Southern
District of California, Northern Division.*

CALIFORNIA LAND CO.,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Decree.

This cause having been regularly called for hearing and tried by the Court, and was heard upon the bill, answer, exhibits, agreements of parties, proof in the case, and arguments of counsel and the Court being fully advised in the premises:

It is now, therefore, hereby ordered, adjudged, and decreed that the plaintiff have judgment, as prayed for in his complaint herein, against the defendants, and each and all of them; that all adverse claims of the defendants, and each of them, and all persons claiming or to claim said premises or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiff be and he is hereby declared and adjudged to be the true and lawful owner of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them, who are hereby perpetually estopped from setting up any claims thereto, or any part thereof. Said premises

are bounded and described as follows, to wit: [48]

Sections Ten (10), Eleven (11), Twelve (12), Thirteen (13), Twenty (20), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), the North half of Section Twenty-eight (28), and all of Sections Thirty-four (34), Thirty-five (35), and Thirty-six (36), in Township Twelve (12) South, Range Twelve (12) East, M. D. M.

Also Section One (1), the North half of the Northeast Quarter, the North half of the Northwest Quarter; the South half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of Section Six (6); the South half of Section Eleven (11); all of Sections Twelve (12), Fifteen (15), Sixteen (16), and Twenty-two (22); the Southwest Quarter of Section Thirty-three (33) and all of Section Thirty-four (34) in Township Thirteen (13) South, Range Twelve (12) East, M. D. M. all in Fresno County, California.

And it is hereby further ordered, adjudged, and declared that the plaintiff do have and recover his costs, hereby taxed at ——— dollars, against the defendant.

5/13/16.

(Signed) OSCAR A. TRIPPET,
Judge.

Decree entered and recorded May 15, 1916.

WM. M. VAN DYKE,
Clerk.

By Leslie S. Colyer,
Deputy Clerk. [49]

[Indorsed]: A-51—Eq. In the District Court of the United States, Southern District of California, Northern Division. California Land Co., Plaintiff, vs. F. F. Doane, Defendant. Decree. Filed May 15, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. 2 Eq. H. 370. [50]

Whereupon, said Bill of Complaint, Subpoena ad Respondendum, Amended Bill of Complaint, Answer to the Amended Bill of Complaint, and said Final Decree are hereto annexed; the said Final Decree being duly signed, filed and enrolled pursuant to the practice of said District Court.

Attest, etc.

[U. S. District Court Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk. [51]

[Indorsed]: No. A-51—Eq. In the District Court of the United States for the Southern District of California, Northern Division. California Land Company, a Corp., vs. F. F. Doane, Defendant. Enrolled Papers. Filed May 18, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Eq. Jl. Book No. 2, page 370. [52]

*In the District Court of the United States, Southern
District of California, Northern Division.*

CALIFORNIA LAND CO.,

Complainant,

vs.

F. F. DOANE,

Defendant.

Stipulation as to Facts.

It is hereby stipulated and agreed by and between counsel for the respective parties herein that the facts in regard to the incorporation of the California Land Company, complainant herein, were as follows:

That prior to the said incorporation the lands involved in this action were owned by ten (10) persons, each having an undivided one-tenth interest in said lands. That the question of the organization or an incorporation to take over the title to these lands had been discussed on numerous occasions by the individuals owning the same; that this discussion had taken place first prior to the sale of the lands or the contract for the sale of these lands to the said F. F. Doane, but the incorporation was not consummated until after default had been made by the said F. F. Doane or his successors in the payment for said lands; that after that event, the persons owning said lands made and agreed to incorporate a complainant company for the following reasons:

First. One of the owners of the lands was quite old and feeble, being over the age of 80 years; an-

other member of the Syndicate was intending to leave the United States to be gone for some time, and in case of the death of any of the members the title to this property would have to go through probate proceedings which might interfere with the expeditious sale or disposal of the same; that it was almost impossible to get these ten [53] persons together at any one time to agree upon policy in regard to the handling, sale, or disposition of the lands. A number of the individuals having an interest in the property were indebted in their localities to certain persons or corporations and these persons and corporations were insisting upon security for this indebtedness, and it was considered that the best way to secure these creditors would be the incorporation of said company and the issuance of stock to each of the individuals, which would represent his interest in the property, and that these certificates of stock could be placed up as collateral security.

That it was very difficult to handle the property when in a Syndicate, as it did not have any head to it and they desired to organize so that its business could be transacted through a board of directors and agents could be appointed by the corporation as necessary to transact its business;

That the members comprising this syndicate had different ideas as to the value of these lands and it was very difficult to procure all of them to agree on any particular price for the sale of these lands; that when these meetings were held to discuss the question of the incorporation of this company it was also talked over and suggested at the meetings and sug-

gested to the individuals that in case of their incorporation if it became necessary or desirable they could in that event, having the necessary diversity of citizenship, invoke the jurisdiction of the United States Court in any litigation commenced by them or by any other persons against said corporation.
[54]

The above is a statement of the facts in regard to the incorporation of this company, and it is also further admitted that the trustees, H. M. Coffin, John McMillan and F. H. Parsons, trustees mentioned in the trust agreement and in the trustee's deed, have during all the times mentioned in the complaint been citizens and residents of the State of Idaho, and were not citizens or residents of the State of California; that one, R. F. Buller, now deceased, was one of the original owners of this property, having an undivided one-tenth interest therein; that upon his death about one year ago or more he left a will in which he named as the executor of his estate the Los Angeles Trust & Savings Bank, a corporation organized and existing under and by virtue of the laws of the State of California and a resident of the State of California.

It is also stipulated and agreed that the exhibit "A" attached to the answer of the defendant is a true and correct copy of the declaration of trust, and that exhibit "B" attached to said answer is a true and correct copy of the Lis Pendens filed in the State Court in the case of F. F. Doane against the Los Angeles Trust & Savings Bank, F. H. Parsons, et al.; and that exhibit "C" filed with said answer is a true

and correct copy of the Articles of Incorporation of the California Land Company.

It is also stipulated and agreed that the original contract for the sale of this land to F. F. Doane provides among other things, as follows: "It is **mutually** agreed between said parties that the said party of the second part (F. F. Doane) shall enter into the possession of said premises on the first day of March, [55] 1913, provided that at that time the said payment of \$55,000 shall have been made, and remain in possession of the same so long as he shall fulfill and perform all the agreements hereinbefore mentioned on his part to be performed and fulfilled and no longer."

It is also agreed that the said sum of \$55,000 was paid on or before the first of March, 1913. This contract was afterwards merged into the declaration of trust marked Exhibit "A" and attached to the answer of the defendant.

It is also stipulated and agreed that default was made in the payments called for by the Declaration of Trust, payable March 1st, 1915, in the sum of \$93,000; that after such default a certain contract marked Complainant Exhibit "A" was entered into between the parties under which a payment of the part due at the time of said default was accepted by the beneficiaries named in trust and the time for the payment of the balance was extended as provided for in said contract, and that thereafter the said defendant or his assigns made default and prior to the filing of the complaint herein on October 1st, 1915. That after such last named default the trus-

tees, H. M. Coffin, John McMillan and F. H. Parsons took possession of the property described in the complaint, through W. Scott Anderson, their agent, and one T. C. Stewart; that since that period of time they have been in possession and have executed leases to different persons who now occupy the premises under said leases for farming or grazing purposes. That part of the property mentioned in said Declaration of Trust, to wit: About two sections thereof, was released from the lien of said trust agreement, and that said two sections have been in the possession of the defendant or his successors in interest. [56]

That certain improvements have been placed upon these two sections; that the lands were at the time of the default, wild, uncultivated and unfenced lands, and not in the actual occupancy of any persons and were not occupied by any person or in the possession of any person until said possession was taken over by the Trustees as above set forth and was held by the California Land Company and in its possession as successor in interest of the said Trustees.

The foregoing facts are stipulated between the parties as correct, and may be used the same as if introduced in evidence and considered by the Court.

(Signed) ALFRED A. FRASER,

Atty, for Complainant.

(Signed) G. R. FREEMAN,

Atty. for Defendant. [57]

[Indorsed]: A-51—Eq. U. S. Dist. Court, So. Dist. Cal., No. Div. California Land Company vs. F. F. Doane. Stipulation as to Facts. Filed May 1,

1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [58]

*In the United States District Court, in and for the
Southern District of California, Southern Di-
vision.*

CALIFORNIA LAND COMPANY,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Conclusions of the Court on Final Hearing.

This is an action to quiet title. The defendant, by his answer, seeks to have a deed in the chain of title declared to be a mortgage. The defendant makes no tender of the amount due on the indebtedness. The plaintiff claims that the deed in controversy is a trust deed. Trust deeds, of course, are valid in this State, and I am of the opinion that this is a trust deed. But whether it is a trust deed or not, it was the duty of the defendant to tender the amount due in order to have a standing in equity. The defendant's attention was called to this at the time of hearing, and he made no attempt to amend his answer. *Hughes vs. Davis*, 40 Cal. 117; *Pico vs. Galliaro*, 52 Cal. 206; *Montgomery vs. Specht*, 55 Cal. 358; *Whitmore vs. San Francisco Savings Union*, 50 Cal. 150, and authorities cited in the briefs.

I have signed a decree quieting the plaintiff's title, and the defendant will have sixty days within which

to take steps to prepare a bill of exceptions or move for a new trial.

(Signed) OSCAR A. TRIPPET,
Judge. [59]

[Indorsed]: A-51—Eq. U. S. District Court, So. Dist. of Cal., No. Div. California Land Company vs. F. F. Doane. Conclusions of the Court on Final Hearing. Filed May 15, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [60]

Plaintiff's Exhibit "A"—Declaration of Trust.

WHEREAS, heretofore, to wit, on or about the 25th day of February, 1913, there was conveyed to the Los Angeles Trust & Savings Bank, a corporation, the following real property, situate in the County of Fresno, State of California, described as follows:

Sections Ten (10), Eleven (11), Twelve (12), Thirteen (13), Fourteen (13), Fifteen (15), Twenty (20), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), the North half of Section Twenty-eight (28), and all of Sections Thirty-four (34), Thirty-five (35), and Thirty-six (36), in Township Twelve (12), South, Range Twelve (12), East M. D. M.

Also Section One (1), the North half of the Northeast Quarter, the North half of the Northwest quarter; the South half of the Southeast Quarter and the Southeast quarter of the Southwest Quarter of Section Six (6); the South half of Section Eleven (11); all of Sections Twelve (12), Fifteen (15),

Sixteen (16) and Twenty-two (22); the Southwest Quarter of Section Thirty-three (33), and all of Section Thirty-four (34) in Township Thirteen (13) South, Range Twelve (12) East, M. D. M.

EXCEPTING therefrom a strip of land two hundred (200) feet in width, being One Hundred (100) feet on each side of the center line of the canal known as the San Joaquin and Kings River Canal and Irrigation Company's Outside Canal, as the same is or shall be finally located through and across Section Twelve (12) [61] and the North half of Sections Ten (10) and Eleven (11), in Township twelve (12) South, Range Twelve (12) East, viz.: Beginning at a point on the Eastern boundary of the Southeast Quarter of said Section Twelve (12); thence in an Northwesterly direction, through said section to a point on the western boundary of its Northwest Quarter; thence in a Northwesterly direction through the North half of Sections Nine (9), Ten (10) and Eleven (11), to a point in Section Nine (9) near the middle of the North boundary thereof; as conveyed to the said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by Henry Miller et al., by deed recorded in Book 201, Page 164 of Deeds, hereinbefore recited.

SUBJECT TO:

1st. Taxes for fiscal year 1913-1914.

2d. An easement for road purposes over a strip of land sixty (60) feet wide lying equally on each side of the center of the located line of the Fresno Flats and Panoche Road; located on parts of Sec-

tions Twenty-five (25), Twenty-six (26), Twenty-seven (27), Thirty-four (34), Thirty-five (35) and Thirty-six (36), in Township Twelve (12) South, Range Twelve (12) East, according to the official survey and map filed with the Board of Supervisors of the County of Fresno, March 1st, 1886; as conveyed by Henry Miller and Charles Lux to the County of Fresno by deed recorded May 5, 1886, in Book 47, Page 638 of Deeds, Records of said County of Fresno. [62]

3rd. An easement for road purposes over those portions of Sections One (1), Six (6) and Twelve (12), in Township Thirteen (13) South, Range Twelve (12), East, embraced within the lines of the "Henry Miller Road," being thirty (30) feet on each side of a line that runs from the Southeast corner of said Section One (1) to the Southeast corner of said Section Six (6); thence South to the Southeast corner of Section Seven (7), of said Township and Range, and thence West to the southwest corner of said Section Seven (7), as conveyed, in part, by Henry Miller to the County of Fresno by deed recorded March 30th, 1890, in Book 144, Page 141 of Deeds, Records of said county.

4th. An easement for road purposes over those portions of said property embraced within the lines of the "Russell Road," which comprises a strip of land Sixty (60) feet wide, the center line of which begins at the Southeast corner of Section Twenty-five (25), Township Twelve (12) South, Range Twelve (12) East, and runs West to the Southwest corner of Section Twenty-seven (27), said Township

and Range; and thence North to the Northwest corner of Section Three (3) of said Township and Range, as conveyed in part by Jesse S. Potter, Executor, etc., to the County of Fresno by deed recorded in Book 219, Page 4 of Deeds, Records of said county.

5th. Right of way through and over the lands owned by Henry Miller and Charles Lux on February 7th, 1872, to wit: Sections Ten (10) to Fifteen (15), inclusive, Twenty-two (22) to Twenty-five (25) inclusive, Thirty-six (36) and the North half of Section Twenty-six (26), Township Twelve (12) South, Range Twelve (12) East, [63] and Section One (1) and the North Half of Section Twelve (12), Township Thirteen (13) South, Range Twelve (12) East, for any and all canal and canals which were already laid at said date, or shall thereafter be constructed by the San Joaquin and Kings River Canal and Irrigation Company, for irrigation or navigation, and to construct, maintain, keep in repair and operate the same, and for tow-paths and other necessary appurtenances to such canals with the right to pass and repass over and upon adjacent land of said Miller and Lux for such purposes; as conveyed by the said Miller and Lux to said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by deed recorded in Book "C," Page 254, of Covenants, Records of said County of Fresno.

6th. Right of way for and right to maintain, over and upon the lands adjacent to the two hundred (200) foot strip of land hereinafter recited, any and

all necessary and proper distributing ditches and watercourses connecting with and leading from the canal constructed on said two hundred (200) foot strip of land; also the right to pass and repass over said adjacent lands with men, teams, and otherwise, with materials as may be necessary for the repair, maintenance and operation of said canal; as conveyed by Henry Miller, et al., to the San Joaquin and Kings River Canal and Irrigation Company, a corporation, *be* deed recorded in Book 201, Page 164 of Deeds, Records of said County of Fresno. [64]

WHEREAS, the said conveyance to the Los Angeles Trust & Savings Bank is absolute in form and purports to convey to said bank the absolute, legal and equitable title to all of said property, subject to the easements and rights of way hereinbefore mentioned, nevertheless the said deed and grant was intended to convey said property to said bank for the benefit of those certain persons hereinafter named and designated as beneficiaries, and whose respective interests are hereinafter set up; and

WHEREAS, said Los Angeles Trust & Savings Bank paid no consideration for said property, and has no interest therein, except as hereinafter stated,

NOW, THEREFORE, this Declaration of Trust,
WITNESSETH:

That the said Los Angeles Trust & Savings Bank, hereinafter referred to as Trustee, hereby certifies and declares that it holds and shall hold all the interest acquired in said real property hereinbefore described, under and by virtue of said conveyance in trust upon the following terms and conditions:

First. To secure to H. N. COFFIN, JOHN McMILLAN and F. H. PARSONS, Trustees, hereinafter known as "Payees," the sum of Three Hundred Seventy-nine Thousand (\$379,000) Dollars, with interest, which sum shall be payable as follows:

Twenty Thousand (\$20,000) Dollars on or before January 1st, 1913;

Fifty-five Thousand (\$55,000) Dollars on March 1st, 1913;

Twenty-five Thousand (\$25,000) Dollars on March 1st, 1914; [65]

Ninety-three Thousand (\$93,000) Dollars on March 1st, 1915;

Ninety-three Thousand (\$93,000) Dollars on March 1st, 1916;

Ninety-three Thousand (\$93,000) Dollars on March 1st, 1917;

—with interest on each installment from March 1st, 1913, until the sum is paid, at the rate of six per cent. per annum, payable semi-annually from March 1st, 1913.

Second. After said property is released to F. F. Doane, in accordance with the terms of This Declaration, to sell the same as instructed by the said F. F. Doane, in accordance with the maps of said property attached to Certificate of Title No. 357692 issued by the Title Insurance & Trust Company of Los Angeles, California, covering the property herein described, it being understood that the said Trustee shall issue and execute all contracts of sale and deeds for any part or parcel of said property, that said contracts of sale shall prescribe the amount and

time of payment of the purchase price thereunder, and said contracts shall further give the name of the purchaser or purchasers of said property and shall contain all restrictions and conditions affecting said property contracted to be sold.

Third. The Trustee shall not be called upon to make any improvements on said property, but the improvements thereon shall be paid for by F. F. Doane, who promises and agrees to hold the said Trustee free and harmless from all liens, claims, demands, charges and expenses by reason of any improvement or improvements made or contracted to be made by them. [66]

Fourth. The said Trustee shall receive all moneys realized from the sale of said property, and shall distribute the same as follows:

1st. To the payment of itself of its compensation, which is hereupon agreed to be one-tenth of one per cent (1%) of the actual sale price on said property, for the drawing and execution of this Declaration and the acceptance of this Trust; Two (\$2.00) Dollars for each contract, each deed, or any other instrument in writing executed by the Trustee, and one per cent. of all moneys coming into its possession or under its control under the terms of this Declaration of Trust, together with necessary expense incurred in the administration of this trust, including costs of certificates of title, and reasonable compensation of all extraordinary services rendered in the execution of this trust, provided, however, that the payees nor their interest or the interest of any person whom they represent in said land shall

be liable for any expense costs or fees of the said Trustee. Nor shall said Trustee be entitled to any lien upon said land or any part thereof superior to the lien of said payees for the balance of the purchase price and interest thereon. But in case said F. F. Doane or his executors, administrators or assigns, should make default in the payments upon his part to be made and said Trustee under the terms of this declaration of trust should proceed to foreclose said F. F. Doane or his assigns in the manner herein provided for, then and in that event, said payees agree to pay said Trustee in full payment for such services of foreclosure and sale, the sum of not to exceed One Thousand Dollars, and the costs of advertising said lands for sale. [67]

2d. To the payment of taxes on the property not payable by any of the purchasers thereof.

3d. To the payment to the payees the sum of Three Hundred Seventy-nine Thousand (\$379,000) Dollars, with interest, in installments and at the times as hereinabove set forth.

4th. The balance of the moneys remaining on hand shall be held subject to the order of F. F. Doane.

Fifth. The parties to this trust are as follows:

H. N. COFFIN, JOHN McMILLAN and F.
H. PARSONS, otherwise known as the Payees;
F. F. DOANE, otherwise known as the Beneficiary.

Sixth. In the event that the said F. F. Doane shall fail to pay or cause to be paid to the Trustee sufficient moneys in accordance with the terms of this

trust, to enable said Trustee to meet the payments due to the payees under this trust at the times and in the amounts hereinbefore set forth, then on demand of said payees or assigns, and without demand by the said Trustee for the payment of any of said sums, the said Trustee shall sell the above granted property or such parts thereof as it shall deem necessary to sell to accomplish the objects of this trust. Such demand for sale by the payees shall be deemed conclusive notice of an election to declare the whole amount of the principal purchase price and interest immediately payable, to which power of election the said F. F. Doane hereby agrees. Said sales shall be made as follows: The said Trustee shall publish notice of the time and place of such sale, with a description of the property to be sold, at least once a week for four successive weeks in some newspaper published in Los Angeles County, California, and may postpone [68] such sale by public announcement at the time and place of sale so advertised, but such postponement shall not exceed ten days; and on the day of sale so advertised, or on the day to which such sale may be *posponed*, said Trustee may sell said property or any portion thereof at public auction at any place in Los Angeles, California, to the highest bidder for cash in lawful money, and the payees hereunder may purchase at such sale. Such sale may be made by any officer of the Trustee authorized by it to conduct similar sales. Upon such sale said Trustee shall execute and deliver to the purchaser a deed to the property sold without any covenants, and from the proceeds shall pay:

1st. Expenses of such sale, and the compensation to the Trustee, in accordance with the terms hereinabove set forth;

2d. To the payees hereunder the amount unpaid on the said purchase price, with accrued interest;

3d. The balance of such proceeds to the order of F. F. Doane.

In the event of sale of said property or any part thereof, and execution of a deed therefor under these trusts, then the recitals therein of any default in payments, publication of notice of sale, demand that sale should be made, postponement of sale, terms of sale, sale, purchaser, payment of purchase money, and of any other fact or facts affecting the regularity or validity of such sale, shall be conclusive proof of such matters and of all other facts recited therein against said F. F. Doane and all other persons; and the receipt for the purchase money contained in such deed shall discharge the said purchaser from all obligation to see to the proper application of the purchase money. Every stipulation herein shall inure to the benefit of the successors and assigns of the respective parties hereto. [69]

Seventh. It is further agreed that any of the above described lands in half sections, and not less than one-half section at a time, may be released to F. F. Doane from under the lien of the purchase price due the payees under this trust, upon the payees receiving payment therefor in the sum of Ten Thousand (\$10,000) Dollars for each half section so released, excepting the first half section to be released, the release price on which shall be

Ninety-six Hundred (\$9,600) Dollars, and that all moneys received for lands so released shall be applied in payment, so far as the same may be, to the next installment thereafter falling due under the terms of payment hereinabove set forth, provided, however, that this provision as to the release of any of said lands shall not apply nor be in force or effect until after said payments of Twenty Thousand (\$20,000) Dollars and Fifty-five Thousand (\$55,000) Dollars first due hereunder shall have been made.

Eighth. It is further agreed that the personal property now located and now used in connection with the above described property, consisting of horses, wagons and general farming machinery, shall be turned over to the possession of the said beneficiary, at the time said beneficiary shall take possession of said property, to be used by said beneficiary and his assigns during the life of this trust, and in the event that the conditions and provisions of this trust and the purchase price of said property shall be fully met by the beneficiary, then and in that event the title to said personal property shall vest in said beneficiary, but in the event of the default of the payment of the purchase price and sale by Trustee under said default, said personal property shall be subject to the same terms of sale as the real property held hereunder, and in fact shall go with the realty when deeded. [70]

Ninth. The said payees and beneficiary shall jointly and severally indemnify and save harmless the Trustee hereunder from any and all liabilities, claims, demands, injuries or damages which it may

suffer or sustain by reason of the acceptance of this trust or its position as Trustee hereunder. That said Trustee shall not be called upon to appear in or defend any suit or suits with reference to said property or growing out of any improvements made thereon, or to take any action as to said property, other than as provided herein, but that the said beneficiary shall appear in and *defendant* any such suit or suits brought with reference to said property or growing out of this trust.

Tenth. The Trustee shall be paid for all extraordinary services rendered in the execution of this trust by the beneficiary, in addition to the compensation hereinbefore provided, and shall have a lien on all of the trust property to secure the same, subject to the lien of the payees, and this trust shall not cease or terminate in any event until all the costs, fees and expenses of said Trustee shall have been fully paid.

Eleventh. It is understood that the said Trustee makes no representation of fact as to the title of the property hereinbefore described, but has the right to assume that the Guaranty Certificate of the Title Insurance & Trust Company No. 357692, correctly shows the record title to said property and the encumbrances thereon; and it shall not be the duty of the said Trustee, but it shall be the duty of the said beneficiary, to pay all taxes, assessments, mortgages, liens and encumbrances now on said property or that may hereafter be assessed or levied thereon by any taxing power or governmental authority, and all [71] mortgages, liens or other encumbrances here-

after placed thereon by the said beneficiary or by any other person at his request.

The conditions and provisions hereof shall inure to and bind the heirs, legatees, devisees, administrators, executors, successors, and assigns of all the parties hereto. Provided, however, that no assignment of any interest in said property or in said trust or under the terms hereof shall be binding upon the Trustee, or shall be construed as notice to said Trustee, unless such assignment is in writing signed by the person transferring his interest and acknowledged before a notary public, and also accepted in writing by the assignee to whom such assignment is made, and delivered to said Trustee.

IN WITNESS WHEREOF, the LOS ANGELES TRUST & SAVINGS BANK has caused these presents to be executed in its corporate name by its Vice-president and Assistant Secretary, and its corporate seal to be hereto affixed, this 14th day of August, 1914.

[Seal] LOS ANGELES TRUST & SAVINGS
BANK.

By W. R. HERVEY,

Vice-President.

By B. H. GRIGSBY,

Assistant Secretary.

We, the undersigned, do hereby certify and declare that the above and foregoing Declaration of Trust correctly and accurately states and declares the trusts under and by which the property described in said Declaration of Trust is held by the Los Angeles Trust & Savings Bank, as Trustee, and that the

same correctly sets forth and declares our respective interests therein, and we hereby ratify and confirm the same in all its particulars in accordance with the conditions and stipulations therein expressed.

H. N. COFFIN,

F. H. PARSONS,

Trustees.

F. F. DOANE,

JOHN McMILLAN. [72]

[Endorsed]: A-51—Eq. U. S. Dist. Court, So. Dist. Cal., No. Div. California Land Co. vs. F. F. Doane, Pl's Ex. A. Filed, May 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [73]

Plaintiff's Exhibit "B"—Agreement for Additional Time Within Which to Make Payment.

WHEREAS, Heretofore, on the 25th day of February, 1913, there was conveyed to the Los Angeles Trust and Savings Bank, a corporation, certain real property situate in Fresno County, State of California, consisting of about fifteen thousand acres of land, and sometimes designated as The Dos Palos Rancho, said property being conveyed to the above-named corporation in trust for the use and benefit of the parties therein mentioned.

AND WHEREAS, Under the terms and conditions of said declaration of trust there became due and payable to the payees mentioned in said declaration of trust, on March first, 1915, the sum of Ninety-three Thousand Dollars, as part payment upon the principal sum mentioned in said declaration of trust,

and the sum of Eight Thousand Three Hundred Seventy Dollars, as interest upon the unpaid principal,

AND WHEREAS, one F. F. Doane mentioned in said declaration of trust as the beneficiary thereof, and the person by whom said payments above mentioned of principal and interest were to be made, has made default in said payments,

NOW THEREFORE, for the consideration hereafter named, It Is Hereby Agreed that if the said F. F. Doane shall pay, or cause to be paid, to the Los Angeles Trust and Savings Bank, for the use and benefit of the payees named in said declaration of trust, the sum of Eight Thousand Three Hundred Seventy Dollars, the amount of said interest due on March first, 1915, and also pay into the Los Angeles Trust and Savings Bank, on or before April 1st, 1915, the further sum of Ten Thousand Dollars, said payment of Ten Thousand Dollars to be applied on the said payment of Ninety-three Thousand Dollars which was due and payable on March first, 1915, then, [74] and in that event, but not otherwise, the said payees mentioned in said declaration of trust, to wit: F. H. Parsons, H. N. Coffin and John McMillan, hereby agree to extend the time for the payment of the balance of said sum of Ninety-three Thousand Dollars falling due March first, 1915, to wit: the sum of Eighty-three Thousand Dollars, to March first, 1916, and the payment of the sum of Ninety-three Thousand Dollars mentioned in said declaration of trust as becoming due and payable on March first, 1916, shall be extended and become due

and payable on March first, 1917; and the sum of Ninety-three Thousand Dollars mentioned in said declaration of trust as becoming due and payable on March first, 1917, is extended to become due and payable on March first, 1918; provided, however, that the above extensions of time on all of said payments are made with the express understanding and agreement that all of said payments so extended shall bear interest at the rate of seven per cent per annum from March first, 1915, said interest to be paid semi-annually, and in the manner and method provided in said declaration of trust.

AND IT IS ALSO EXPRESSLY UNDERSTOOD AND AGREED that each and every of the conditions or agreements mentioned in said declaration of trust shall remain in full force and effect except as the same is expressly changed or modified by this agreement, and that the waiver of the strict compliance of the terms of said declaration of trust in the payment of the said sum of Ninety-three Thousand Dollars, which was due and payable on March first, 1915, shall not be construed to be, nor have the effect of, releasing said F. F. Doane or his assigns from a strict compliance as to the time of or manner of payment of all future installments of either principal or interest. [75]

This agreement is supplemental to that declaration of trust heretofore referred to and inures to the benefit of, and binds, the heirs, administrators, executors, successors and assigns of each and all the parties hereto.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this — day of March, 1915.

(Signed) F. H. PARSONS.

(Signed) H. N. COFFIN.

(Signed) JOHN McMILLAN.

The foregoing supplemental declaration of trust is hereby accepted.

LOS ANGELES TRUST AND SAVINGS
BANK.

By W. R. HENRY,
Vice-President.

[Corporate Seal]
J. D. C.

By J. D. CARSON,
Assistant Secretary.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of April, 1915.

(Signed) F. F. DOANE,

Beneficiary mentioned in original Declaration of Trust.

State of California,
County of Los Angeles,—ss.

On this 1st day of April, 1915, before me, George C. Cook, a notary public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared F. F. Doane, known to me to be the person whose name is subscribed to the within instrument and that he acknowledged that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal.] [76]

(Signed) GEORGE C. COOK,
Notary Public.

[Indorsed]: A-51—Eq. U. S. Dist. Court, So. Dist. Cal., No. Div. California Land Co. vs. F. F. Doane. Pl's Ex. "B." Filed May 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [77]

Plaintiff's Exhibit "C"—Trustee's Deed.
LOS ANGELES TRUST & SAVINGS BANK,
Trust Department.
Trust #1781.

TRUSTEE'S DEED.

THIS INDENTURE, made this 23d day of December, 1915, between LOS ANGELES TRUST & SAVINGS BANK, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, Trustee as hereinafter stated, the party of the first part, and H. N. COFFIN, JOHN McMILLAN and F. H. PARSONS, Trustees, of Boise, Idaho, the parties of the second part,

WHEREAS, by a Deed absolute in form, dated February 25th, 1913, recorded in Book 527, page 448 of Deeds, Fresno County Records, there was conveyed to the Los Angeles Trust & Savings Bank, a corporation, certain lands and premises as therein and as hereinafter described, and also certain personal property then located and used in connection with said hereinafter described property, consisting of horses, wagons and general farming machinery, was turned over to the hereinafter mentioned Bene-

fiary to be used by said Beneficiary, or his assigns, during the life of the hereinafter mentioned Trust, but the title to said personal property was to remain in the Trustee until the real property was fully paid for; and

WHEREAS, on or about August 14th, 1914, the said Los Angeles Trust & Savings Bank executed its certain Declaration of Trust Number 1781, in which said Declaration of Trust was set out the trusts upon which the said property, both real and personal, was to be held by said Los Angeles Trust & Savings Bank, as Trustee, for H. N. Coffin, John McMillan and F. H. Parsons, sometimes otherwise known and designated as the "Payees," and for [78] F. F. Doane, sometimes known and designated as the "Beneficiary," and which said Declaration of Trust was ratified and confirmed in all its particulars by the said Payees and said Beneficiary; and

WHEREAS, said Declaration of Trust provides that the Payees shall receive from the Beneficiary the sum of Three Hundred and Seventy-nine Thousand Dollars (\$379,000), with interest, payable as follows:

\$20,000.00 on or before January 1st, 1913;

\$55,000.00 on March 1st, 1913;

\$25,000.00 on March 1st, 1914;

\$93,000.00 on March 1st, 1915;

\$93,000.00 on March 1st, 1916;

\$93,000.00 on March 1st, 1917;

with interest on each installment from March 1st, 1913, until the sum is paid, at the rate of six per cent (6%) per annum, payable semi-annually from March 1st, 1913; and

WHEREAS, on or about April 1st, 1915, by an instrument in writing, the said Payees and said Beneficiary changed or modified said Trust Agreement in so far as it pertained to the remaining payments due the Payees from said Beneficiary so that the Payees were to receive from the Beneficiary the remaining sum of Two Hundred and Seventy-nine Thousand Dollars (\$279,000) with interest, payable as follows:

\$10,000 on or before April 1st, 1915;

\$83,000.00 on March 1st, 1916;

\$93,000.00 on March 1st, 1917;

\$93,000.00 on March 1st, 1918;

provided, however, that the above extension of time on all of said payments was made with the express understanding and agreement that all of said payments so extended should bear interest at the rate of seven per cent (7%) per annum from March 1st, 1915, payable semi-annually, and in the manner and method provided in said Declaration of Trust; and

WHEREAS, on or about August 21st, 1915, by an instrument [79] in writing filed with said Los Angeles Trust & Savings Bank, the said Payees granted an extension of thirty (30) days' time upon the payment of the interest installment due September 1st, 1915, extending such payment of interest to October 1st, 1915; and

WHEREAS, said Trust Agreement provides in the event that said F. F. Doane shall fail to pay, or cause to be paid, to the Trustee Los Angeles Trust & Savings Bank, such moneys in accordance with the terms of said Trust, to enable said Trustee to meet the payments due to the Payees under said Trust, at

the times and in the amounts hereinbefore set forth, then on demand of said Payees or assigns, and without demand by the said Trustee for the payment of any of said sums, the said Trustee shall sell said property, both real and personal, or such parts thereof as it shall deem necessary to sell to accomplish the objects of said Trust. Such demand for sale by the Payees shall be deemed conclusive notice of an election to declare the whole amount of the principal purchase price and interest immediately payable, and

WHEREAS, default has been made by the said F. F. Doane in the payment of the amounts due under said Declaration of Trust in this, that the installment of semi-annual interest due September 1st, 1915, and extended as above recited to October 1st, 1915, was not paid when due on October 1st, 1915, and has not since been paid; and

WHEREAS, the said Payees, H. N. Coffin, John McMillan and F. H. Parsons, did on the 12th day of October, 1915, declare that default had been made in the payment of the interest due as aforesaid, and that no part of the principal sum of said indebtedness had been paid except the sum of One Hundred Fourteen Thousand Six Hundred Dollars (\$114,600), and on said date they elected to and did then declare the whole of the remaining sum of the principal of said indebtedness and interest thereon to be due, unpaid, owing and payable under the terms of said Declaration of Trust, and did order and direct the said party of the first part [80] herein, as Trustee, to sell the real property and premises granted

to the said Trustee and the personal property held by it under said Declaration of Trust, under the terms thereof and in the manner therein specified; and

WHEREAS, on November 3d, 1915, the said Beneficiary caused to be paid to the Trustee the sum of Four Hundred Dollars (\$400) to apply upon the principal of the indebtedness due the said Payees, which sum was duly credited thereon, making a total payment upon the principal sum of the indebtedness of One Hundred Fifteen Thousand Dollars (\$115,000), and leaving a balance due on the principal of Two Hundred Sixty-four Thousand Dollars (\$264,000), which sum remained unpaid up to the time of the sale hereinafter referred to; and

WHEREAS, under the provisions of said Declaration of Trust there has been expended by the said H. N. Coffin, John McMillan and F. H. Parsons, for the protection of the real property described in said Declaration of Trust, the sum of Two Thousand Four Hundred Sixty-one and 99/100 (\$2,461.99), in payment of taxes for the fiscal year 1915-1916 upon said real property, which sum remained unpaid up to the time of the sale hereinafter referred to; and

WHEREAS, the said party of the first part, in consequence of the aforesaid election, declaration and demand of the said H. N. Coffin, John McMillan and F. H. Parsons, and in compliance with the terms of said Declaration of Trust, did publish at least once a week for four (4) successive weeks next before the 13th day of December, 1915, in the "Los Angeles Daily Journal," a newspaper of general circulation

published in the City of Los Angeles, County of Los Angeles, State of California, notice signed by it as such Trustee that it, as such Trustee, would under the provisions of said Declaration of Trust sell all of the interest in the real property and premises conveyed to the said Trustee [81] by the foresaid deed and the personal property held by it under said Declaration of Trust, as hereinafter described, at public auction on Monday, the 13th day of December, 1915, at the hour of eleven o'clock A. M., of that day, at the Sixth Street entrance of the Trust & Savings Building, #215 West Sixth Street, in the City of Los Angeles, County of Los Angeles, State of California, which notice contained a full, true and correct description of the real and personal property so to be sold; and

WHEREAS, said party of the first part as such Trustee, at the time and place so specified and advertised, to wit: On the 13th day of December, 1915, at 11 o'clock A. M. of that day, at the Sixth Street entrance of the Trust & Savings Building, #215 West Sixth Street, in the City of Los Angeles, State of California, did by public announcement and at the request of all the parties interested, postpone such sale to the 23d day of December, 1915, at 11 o'clock A. M. of said day at the aforesaid designated place of sale, and did also publish in the aforesaid newspaper, to wit: "Los Angeles Daily Journal." on the 18th day of December, 1915, the aforesaid Notice of Sale, together with a further notice signed by it as Trustee that the sale so advertised was postponed to and would be made and take place at the place there-

in specified on the 23d day of December, 1915, at 11 o'clock A. M. and

WHEREAS, all of said sums so secured then remaining unpaid, the said party of the first part, as such Trustee, at the time and place to which such sale was postponed, to wit: On the 23d day of December, 1915, at 11 o'clock A. M. of that day, at the Sixth Street entrance of the Trust & Savings Building, #215 West Sixth Street, in the City of Los Angeles, State of California, did offer for sale in separate parcels at public auction the premises and property hereinafter described, [82] and being unable to get a bid for less than the whole, the said party of the first part, as such Trustee, did sell the premises and property hereinafter described as a whole to the said parties of the second part, they being the highest and best bidders therefor, for the sum of Two Hundred Eighty-two Thousand Five Hundred Fifty-seven Dollars (\$282,557) cash, lawful money of the United States.

NOW, THEREFORE, THIS INDENTURE WITNESSETH: That the said party of the first part as such Trustee as aforesaid, in consideration of the premises and of the sum of Two Hundred Eighty-two Thousand Five Hundred and Fifty-seven Dollars (\$282,557) to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and by virtue of the authority in it derived and vested through said Declaration of Trust, does by these presents GRANT, BARGAIN, SELL, CONVEY AND CONFIRM, WITHOUT WARRANTY, unto the said parties of the second

part, and to their heirs, successors and assigns, all that certain real property situate in the County of Fresno, State of California, described as follows:

Sections Ten (10), Eleven (11), Twelve (12), Thirteen (13), Twenty (20), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), the North half of Section Twenty-eight (28), and all of Sections Thirty-four (34), Thirty-five (35), and Thirty-six (26), in Township Twelve (12) South, Range Twelve (12) East, M. D. M. [83]

Also Section One (1), the North half of the Northeast quarter, the North half of the Northwest quarter; the South half of the Southeast quarter, and the Southeast quarter of the Southwest quarter of Section Six (6); the South half of Section Eleven (11); all of Sections Twelve (12), Fifteen (15), Sixteen (16) and Twenty-two (22); the Southwest quarter of Section Thirty-three (33), and all of Section Thirty-four (34), in Township Thirteen (13) South, Range Twelve (12) East, M. D. M.

EXCEPTING therefrom a strip of land two hundred (200) feet in width, being One Hundred (100) feet on each side of the center line of the Canal known as the San Joaquin and Kings River Canal and Irrigation Company's Outside Canal, as the same is or shall be finally located through and across Section Twelve (12), and the North half of Sections Ten (10) and Eleven (11) in Township Twelve (12) South, Range Twelve (12) East, viz.: Beginning at a point on the Eastern boundary of the Southeast quarter of said Section Twelve (12); thence in a

Northwesterly direction, through said Section to a point through said Section to a point on the Western boundary of its Northwest quarter; thence in a Northwesterly direction through the North half of Sections Nine (9), Ten (10), and Eleven (11), to a point in section Nine (9) near the middle of the North boundary thereof; as conveyed to the said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by Henry Miller et al., by deed recorded in Book 201, Page 164 of Deeds, hereinbefore recited. [84]

Sections Fourteen (14) and Fifteen (15), Township Twelve (12) South, Range (12) East, M. D. M., having been released from the lien of said Trust and not subject to this sale.

Subject to an easement for road purposes over a portion of the above described property, as conveyed by the deed recorded in Book 47, Page 638 of Deeds, Fresno County Records.

Subject, also, to an easement for road purposes over a portion of the above described property, as granted by the Deed recorded in Book 144, Page 141 of Deeds, Fresno County Records.

Subject, also, to an easement for road purposes over a portion of the above-described property, as granted by the Deed recorded in Book 219, Page 4 of Deeds, Fresno County Records.

Subject, also, to a right of way through and over a portion of the above described property, as conveyed by the Deed recorded in Book "C," Page 254 of Covenants, Fresno County Records.

Subject, also, to a right of way through and over

a portion of the above described property, as granted by the Deed recorded in Book 201, Page 164 of Deeds.

Subject, also, to a right of way granted by Los Angeles Trust & Savings Bank to Valley Pipe Line, a corporation, by an instrument dated August 4th, 1914.

TOGETHER with certain personal property located on and used in connection with said hereinbefore described real property, consisting of horses, wagons, and general farming machinery, **which said personal property** has been heretofore turned over into the possession of the Beneficiary by the Payees.
[85]

TOGETHER with the appurtenances thereunto belonging.

TO HAVE AND TO HOLD the said real and personal property unto the said parties of the second part, their heirs, successors and assigns forever, but without any covenant or covenants upon the part of the party of the first part herein whatever, express or implied, regarding the title to said property or the encumbrances thereon.

IN WITNESS WHEREOF, the said Los Angeles Trust & Savings Bank has caused its corporate name and seal to be hereunto affixed by its Vice-president and Assistant Secretary, thereunto duly authorized, the day and year first above written.

LOS ANGELES TRUST & SAVINGS BANK,

Trustee.

By W. H. HERVEY,

Vice-president.

By J. D. CARSON,

Assistant Secretary. [86]

State of California,
County of Los Angeles,—ss.

On this 23 day of December, A. D. 1915, before me H. O. Smyser, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and qualified, personally appeared W. R. HERVEY, known to me to be the Vice-president, and J. D. CARSON, known to me to be the Assistant Secretary of the LOS ANGELES TRUST & SAVINGS BANK, Trustee, the corporation that executed the within instrument, on behalf of the Corporation therein named, and acknowledged to me that such corporation executed the same, as such Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County, the day and year in this certificate first above written.

[Seal] (Signed) H. O. SMYSER,
Notary Public in and for the County of Los Angeles,
State of California.

(Stamps) [87]

[Indorsed]: A-51—Eq. U. S. Dist. Court, So. Dist. Cal. No. Div. Cal. Land Co., vs. F. F. Doane. Pl's Exh. "C." Filed May 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Trust 1781. Trustee's Deed. Los Angeles Trust & Savings Bank, Trust Department, Trust & Savings Bldg. Los Angeles. [88]

**Plaintiff's Exhibit "D"—Deed from John McMillan,
H. N. Coffin and F. H. Parsons to California
Land Company.**

THIS INDENTURE, Made this 12th day of February, 1916, between John McMillan, H. N. Coffin, and F. H. Parsons, trustees, all of Boise City, County of Ada, State of Idaho, the parties of the first part, and California Land Company, a corporation, party of the second part,

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of One Dollar and other valuable consideration, in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the party of the second part and its assigns forever, all the following described real estate, situated in the County of Fresno, State of California, to wit:

Sections Ten (10), Eleven (11), Twelve (12), Thirteen (13), Twenty (20), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), the North half of Section Twenty-eight (28), and all of Sections Thirty-four (34), Thirty-five (35), and Thirty-six (36), in township Twelve (12) South, Range Twelve (12) East, M. D. M.

Also Section One (1), the North half of the Northeast Quarter, the North half of the Northwest Quarter; the South half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of

Section Six (6); the South half of Section Eleven (11); all of Sections Twelve (12), Fifteen (15), Sixteen (16), and Twenty-two (22); the Southwest Quarter of Section [89—90] Thirty-three (33) and all of Section Thirty-four (34) in Township Thirteen (13) South, Range Twelve (12) East, M. D. M.

EXCEPTING therefrom a strip of land Two Hundred feet in width, being One Hundred (100) feet on each side of the center line of the canal known as the San Joaquin and Kings River Canal and Irrigation Company's Outside Canal, as the same is or shall be finally located through and across Section Twelve (12) and the North half of Sections Ten (10) and Eleven (11) in Township Twelve South, Range Twelve (12) East, viz.: Beginning at a point on the Eastern boundary of the Southeast Quarter of said Section Twelve (12); thence in a Northwesterly direction, through said Section to a point on the Western boundary of its Northwest Quarter; thence in a Northwesterly direction through the North half of Sections Nine (9), Ten (10), and Eleven (11), to a point in Section Nine (9) near the middle of the North boundary thereof; as conveyed to the said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by Henry Miller et al., by deed recorded in Book 201, Page 164 of Deeds, hereinbefore recited.

SUBJECT TO:

1st. An easement for road purposes over a strip of land sixty (60) feet wide lying equally on each side of the center of the located line of the Fresno Flats

and Panoche Road; located on parts of Sections Twenty-five (25), Twenty-six (26), Twenty-seven (27), Thirty-four (34), Thirty-five (35) and Thirty-six (36), in Township Twelve (12) South, Range Twelve (12) East, according to the official survey and map filed with the Board of Supervisors of the County of Fresno, March 1st, 1886, as conveyed by Henry Miller and Charles Lux to the County of Fresno by deed recorded May 6, 1886, in Book 47, Page 638 of Deeds, Records of said County of Fresno.

[91]

2d. An easement for road purposes over those portions of Sections One (1), Six (6) and Twelve (12) in Township Thirteen (13) South, Range Twelve (12) East, embraced within the lines of the "Henry Miller Road," being thirty (30) feet on each side of a line that runs from the Southeast corner of said Section One (1) to the Southeast corner of said Section Six (6); thence South to the Southeast corner of Section Seven (7), of said Township and Range, and thence West to the Southwest corner of said Section Seven (7), as conveyed, in part, by Henry Miller to the County of Fresno by deed recorded March 30th, 1890, in Book 144, Page 141 of Deeds, Records of said County.

3d. An easement for road purposes over those portions of said property embraced within the lines of the "Russell Road," which comprises a strip of land Sixty (60) feet wide, the center line of which begins at the Southeast corner of Section Twenty-five (25), Township Twelve (12) South, Range Twelve (12) East, and runs west to the Southwest corner of

Section Twenty-seven (27) said Township and Range; and thence North to the Northwest corner of Section Three (3) of said Township and Range, as conveyed in part by Jesse S. Potter, Executor, etc., to the County of Fresno by deed recorded in Book 219, Page 4 of Deeds, Records of said county.

4th. Right of way through and over the lands owned by Henry Miller and Charles Lux on February 7th, 1872, to wit: Sections Ten (10) to Fifteen (15), inclusive, Twenty-two (22) to Twenty-five (25) inclusive, Thirty-six (36) [92] and the North half of Section Twenty-six (26), Township Twelve (2) South, Range Twelve (12) East, and Section One (1) and the North Half of Section Twelve (12), Township Thirteen (13) South, Range Twelve (12) East, for any and all canal and canals which were already laid at said date, or shall thereafter be constructed by the San Joaquin and Kings River Canal and Irrigation Company, for irrigation or navigation, and to construct, maintain, keep in repair and operate the same, and for tow paths and other necessary appurtenances to such canals with the right to pass and repass over and upon adjacent land of said Miller and Lux for such purposes; as conveyed by the said Miller and Lux to said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by deed recorded in Book "C," page 254, of Covenants Records of said County of Fresno.

5th. Right of way for and right to maintain, over and upon the lands adjacent to the two hundred (200) foot strip of land hereinafter recited, any and

all necessary and proper distributing ditches and water courses connecting with and leading from the canal constructed on said two hundred (200) foot strip of land; also the right to pass and repass over said adjacent lands with men, teams and otherwise, with materials as may be necessary for the repair, maintenance and operation of said canal; as conveyed by Henry Miller et al. to the San Joaquin and Kings River Canal and Irrigation Company, a corporation, by deed recorded in Book 201, page 164 of Deeds, Records of said County of Fresno. [93]

TOGETHER WITH all and singular the tene-ments, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the re-version and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to said property, as well in law as in equity, of the said parties of the first part:

TO HAVE AND TO HOLD, All and singular, the above mentioned and described premises, together with appurtenances, unto the party of the second part, and to its assigns forever.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) H. N. COFFIN,

(Signed) JOHN McMILLAN,

(Signed) F. H. PARSONS,

Signed, sealed and delivered in the presence of:

(Signed) JOHN D. DALY,

(Signed) H. S. STREETER.

Trustees.

[\$100. Revenue Stamp Attached and Cancelled.]

State of Idaho,
County of Ada,—ss.

On this 15th day of February, 1916, before me Mont. P. Meholin, a notary public in and for said county, personally appeared H. N. Coffin, John McMillan & F. H. Parsons, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Notarial Seal]

(Signed) MONT. P. MEHOLIN,
Notary Public for Idaho, Res. Boise, Idaho.

Com. Exp. Dec. 15, 1918. [94]

[Indorsed]: Deed 4466. John McMillan, H. N. Coffin, F. H. Parsons, to California Land Co. Abstract AB Indexed B, Comparer — Copyist 4, Compared G, Paged —. Filed for Record at the Request of Pacific Nat'l. Bank, Boise, Idaho, Feb. 25, A. D., 1916, at 16 Min. past 10 o'clock A. M., and Recorded in Vol. 597, of Deeds, pg. 162 et seq. Fresno County Records, R. N. Barstow, County Recorder. By R. A. Fleshner, Deputy Recorder. 16/2.20. A-51—Eq. U. S. Dist. Court, So. Dist. Cal. No. Div. Cal. Land Co. vs. F. F. Doane. Plffs. Exh. "D." Filed May 1, 1916, Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [95]

Defendant's Exhibit 1—Copy of Record in Superior Court, Fresno County, California, No. 18,871, F. F. Doane, Plaintiff, vs. Los Angeles Trust & Savings Bank et al., Defendants.

*In the Superior Court of the State of California, in
and for the County of Fresno.*

F. F. DOANE,

Plaintiff,

vs.

LOS ANGELES TRUST & SAVINGS BANK, a Corporation, H. N. COFFIN, JOHN McMILLAN and F. H. PARSONS, as Trustees, H. N. COFFIN, JOHN McMILLAN and F. H. PARSONS and JOHN DOE, RICHARD ROE and JOHN ROE and RICHARD DOE,

Defendants.

The plaintiff for cause of action alleges:

I.

That the said Los Angeles Trust & Savings Bank is and was during all the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Los Angeles, Los Angeles County, State of California.

II.

That the above-named defendants, John Doe, Richard Roe, John Roe and Richard Doe are fictitious names and their true names are unknown to plaintiff, and as soon as their true names are known, plaintiff will move the court that their true names

be inserted in the proceedings in the above-entitled action;

III.

Plaintiff alleges that the defendants John Doe, Richard Roe, John Roe and Richard Doe have or claim to have some interest, right, title, claim or lien upon said property, but plaintiff alleges that such interest, right, title, claim or lien are subject and subsequent to plaintiff's right in said premises, hereinafter described. [96]

IV.

That on the 25th day of February, 1913, there was executed and delivered to the defendant, Los Angeles Trust & Savings Bank, a corporation, a deed purporting to convey to it the following described property situated in Fresno County, State of California, and particularly described as follows, to wit:

Sections 10, 11, 12, 13, 14, 15, 20, 22, 23, 24, 25, 26, 27, the north half of Section 28, and all of Sections 34, 35 and 36, in Township 12 South, Range 12 East, M. D. M.,

Also section 1, the north half of the northeast quarter, the north half of the northwest quarter, the south half of the southeast quarter and the southeast quarter of the southwest quarter of section 6; the south half of section 11; and all of sections 12, 15, 16, and 22; the southwest quarter of section 33; and all of section 34, in Township 13 south, range 12 east, M. D. M.

Excepting therefrom a strip of land 200 feet in width, being 100 feet on each side of the center line of the Canal known as the San Joaquin and Kings

River Canal and Irrigation Company's Outside Canal, as the same is or shall be finally located through and across section 12 and the north half of sections 10 and 11, in Township 12 south, range 12 east, viz.: Beginning at a point on the eastern boundary of the southeast quarter of said Section 12, thence in a northwesterly direction, through said section to a point on the western boundary of its northwest quarter; thence in a northwesterly direction through the north half of sections 9, 10, and 11, to a point in section 9, near the middle of the north boundary thereof; as conveyed to the said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by Henry Miller, et al., by deed recorded in Book 201, page 164 of Deeds, hereinbefore recited; [97]

SUBJECT TO:

- 1st. Taxes for the fiscal year 1913-1914.
- 2d. An easement for road purposes over a strip of land (60) feet wide lying equally on each side of the center of the located line of the Fresno Flats and Panoche Road, located on parts of Sections 25, 26, 27, 34, 35 and 36 in Township 12 south, range 13 east, according to the official survey and map filed with the Board of Supervisors of the County of Fresno, March 1st, 1886; as conveyed by Henry Miller and Charles Lux to the County of Fresno by deed recorded May 5th, 1886, in Book 47, page 638 of Deeds, records of said County of Fresno.

- 3d. An easement for road purposes over those portions of sections 1, 6, and 12, in township 13 south, range 12 east, embraced within the lines of the

"Henry Miller Road," being thirty (30) feet on each side of a line that runs from the southeast corner of said section 1 to the southeast corner of said section 6; thence south to the southeast corner of section 7, of said township and range and thence west to the southwest corner of said section 7, as conveyed in part, by Henry Miller to the County of Fresno by deed recorded March 30th, 1890, in Book 144, page 141 of Deeds, records of said County.

4th. An easement for road purposes over those portions of said property embraced within the lines of the "Russell Road," which comprises a strip of land sixty (60) feet wide, the center line of which begins at the southeast corner of section 25, township 12 south, range 12 east, and runs west to the southwest corner of section 27, said township and range; and thence north to the northwest corner of section 3 of said township and range; as conveyed in part, by Jesse S. Potter, Executor, etc., to the County of Fresno by deed recorded in Book 219, page 4 of Deeds, records of said County. [98]

5th. Right of way through and over the lands owned by Henry Miller and Charles Lux on February 7th, 1872, to wit: Sections 10 to 15 inclusive, 22 to 25 inclusive, 36 and the north half of section 26, township 12 south range 12 east, and section 1 and the north half of section 12, township 13 south, range 12 east, for any and all canal and canals which were already laid at said date, or shall thereafter be constructed, by the San Joaquin and Kings River Canal and Irrigation Company, for irrigation or navigation, and to construct, maintain, keep in repair and

operate the same, and for tow paths and other necessary appurtenances to such canals; with the right to pass and repass over and upon adjacent land of said Miller and Lux for such purposes, as conveyed by the said Miller and Lux to said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by deed recorded in Book "C," page 254 of Covenants, records of said county of Fresno.

6th. Right of way for and right to maintain, over and upon the lands adjacent to the 200-foot strip of land hereinafter recited, any and all necessary and proper distributing ditches and watercourses connecting with and leading from the canal constructed on said 200-foot strip of land; also the right to pass and repass over said adjacent lands with men, teams and otherwise, with materials as may be necessary for the repair, maintenance and operation of said canal; as conveyed by Henry Miller et al. to the San Joaquin and Kings River Canal and Irrigation Company, a corporation, by deed recorded in Book 201, page 164, of Deeds, records of said County of Fresno.

There was also conveyed to said Los Angeles Trust & Savings Bank the personal property located upon and used in connection with the above-described property, consisting of horses, wagons, and general farming machinery. [99]

V.

That said plaintiff has since the date of said deed been in possession of said premises and personal property hereinbefore described, and plaintiff has had and now has control and possession of said property.

VI.

That the said conveyance to said Los Angeles Trust and Savings Bank, although absolute in form purporting to convey to said bank the absolute, legal and equitable title to said property, subject to the easements and rights of way therein mentioned, did not in fact convey the title to said property to said Los Angeles Trust & Savings Bank, but said deed was intended by the parties at the time of its delivery, to wit, on February 25, 1913, as security for the payment by said F. F. Doane, plaintiff herein, to the defendants H. N. Coffin, John McMillan, and F. H. Parsons as trustees, the sum of three hundred fifty-nine thousand dollars (\$359,000), with interest thereon at the rate of six (6) per cent per annum payable semi-annually from March 1, 1913.

VII.

That thereafter said plaintiff paid to said Los Angeles Trust & Savings Bank for the defendants H. N. Coffin, John McMillan and F. H. Parsons as trustees, to be applied upon the payment of said indebtedness and mortgage the following sums:

March 1, 1913, the sum of \$55,000

April 1, 1914, the sum of \$25,000

April 1, 1915, the sum of \$10,000

Sept. 30, 1915, the sum of \$4,600

and has paid on account of interest on said indebtedness as follows:

Sept. 1, 1913, the sum of \$9,120

Feb. 28, 1914, the sum of \$9,120

Sept. 1, 1914, the sum of \$8,370

April 1, 1915, the sum of \$8,370

making a total payment on principal and interest of \$149,580. [100]

That there remained to be paid the sum of \$83,000 on March 1, 1916; the sum of \$93,000 on March 1, 1917; and the sum of \$93,000 on March 1, 1918, with interest at the rate of seven per annum payable semi-annually from March 1, 1915.

VIII.

That the defendants H. N. Coffin, John McMillan and F. H. Parsons, both as individuals and as trustees, hold a lien upon said property for the balance of said indebtedness.

IX.

That the said conveyance of said property by the said deed to the Los Angeles Trust & Savings Bank was intended by the parties thereto, and the plaintiff herein, for, and is in effect and in fact, a mortgage.

X.

That said property was deeded and conveyed to said Los Angeles Trust & Savings Bank without any consideration whatever, and the Los Angeles Trust & Savings Bank have no interest or title, either legal or equitable, in and to said property by reason of such conveyance or otherwise, and are holding said property as aforesaid as the agent of said plaintiff and defendants H. N. Coffin, John McMillan and F. H. Parsons.

XI.

That it was intended by the parties hereto and to said deed, that in case of default by the said F. F. Doane in making the payments upon his part to be

made, the Los Angeles Trust & Savings Bank were authorized to foreclose the lien upon said property and sell the same for the payment of the balance of the purchase price due said H. N. Coffin, John McMillan and F. H. Parsons.

XII.

That on the 14th day of August, 1914, the plaintiff herein [101] gave a power of attorney in writing authorizing the said Los Angeles Trust & Savings Bank to sell said property in case of default of said plaintiff and apply the proceeds to the payment of said balance of said indebtedness; but said plaintiff before any default by him upon his part and before the said Los Angeles Trust & Savings Bank and the said H. N. Coffin, John McMillan and F. H. Parsons had exercised any authority or rights under said power of attorney or agency, revoked and annulled the said agency and authority to sell said property by notice in writing, and served the same upon the said defendants prior to March 1, 1915.

XIII.

That thereafter there became due one of the installments, to wit, \$93,000 and interest March 1, 1915, and the said defendant Los Angeles Trust & Savings Bank and the said H. N. Coffin, John McMillan and F. H. Parsons accepted, without protest or objection to such revocation or authority to sell said land in case of default as aforesaid, the following sums, to wit:

April 1, 1915, the sum of \$10,000 on principal and \$8,370 interest, and on September 30, 1915, the further sum of \$4,600 on the principal.

XIV.

That on the 1st day of October, 1915, there became due the defendants H. N. Coffin, John McMillan and F. H. Parsons, the sum of \$9,415, the semi-annual interest; and the same not being paid the defendants, H. N. Coffin, John McMillan and F. H. Parsons, on October 21st, 1915, declared default had been made and that the whole of the remaining indebtedness, to wit, \$264,400, with interest thereon at the rate of seven per cent per annum, immediately due and payable, and ordered and demanded the Los Angeles Trust & Savings Bank to advertise and sell the [102] said property in accordance with the terms of that certain power to sell heretofore revoked as aforesaid, and notified plaintiff there would be no redemption from such sale.

XV.

That on the 3d day of November, 1913, the said Los Angeles Trust & Savings Bank caused notice of sale to be made and published in the "Los Angeles Daily Journal," a newspaper of general circulation, whereby the said Los Angeles Trust & Savings Bank gave notice that it will sell the hereinbefore described property (except sections 14 and 15 of township 12 south, range 12 east, M. D. M., which sections have been heretofore released from the lien held by said Coffin, McMillan and Parsons as trustees, and also except that certain right of way granted by the said Los Angeles Trust & Savings Bank to the Valley Pipe Line Company, a corporation, by an instrument dated August 4, 1914) on the 13th day of December,

1915, at the hour of 11 o'clock A. M. of said day, at Los Angeles, California, at public auction for cash.

XVI.

That the said Los Angeles Trust and Savings Bank threaten and have stated in said notice, that they will sell all the interest conveyed to it in and to the said real and personal property hereinbefore described, or so much thereof as may be necessary, to pay the said sum of \$264,400, and interest thereon from March 1, 1915, at the rate of seven per cent per annum (less the sum of \$400 paid November 3, 1915, on account of the principal thereof); the expenses of said sale, and the expenses of the said Los Angeles Trust & Savings Bank in the sum of \$1000.

XVII.

That the said Los Angeles Trust and Savings Bank and the defendants Coffin, McMillan and Parsons now claim that the said [103] deed to the said Los Angeles & Savings Bank conveys the absolute title to said property, and that the sale of said property by said Los Angeles Trust & Savings Bank to any third party will convey the absolute title to said property; but the plaintiff alleges that said claim is without right, either in law or equity, and if the said sale is permitted and not enjoined by this Court, the said defendants Los Angeles Trust and Savings Bank and H. N. Coffin, John McMillan and F. H. Parsons will proceed to convey the said pretended title to said property and thereby encumber and cloud the title to said property and will thereby attempt to deprive the plaintiff of his rights in said property and the redemption thereof.

XVIII.

That unless the said defendants are restrained from making said sale, this plaintiff will suffer irreparable injury and loss, and plaintiff will be without a plain, speedy or adequate remedy at law if the defendants are permitted to sell the said property as they claim they have the right to do.

WHEREFORE, plaintiff prays judgment that the said deed executed by H. N. Coffin, McMillan and Parsons purporting to convey said property to said Los Angeles Trust & Savings Bank be declared a mortgage, and that said plaintiff herein shall have the right to redeem said property in the manner and time as provided under the laws of the State of California, for the redemption of property under foreclosure sale; and that the defendants be restrained permanently from the sale of said property under said notice of sale and prevented from selling and conveying the absolute title to said property other than by foreclosure and sale as provided by section 726 of the Code of Civil Procedure of the State of California, and that [104] plaintiff have such other and further relief as to the Court shall deem just and equitable in the premises.

G. R. FREEMAN,
Attorney for Plaintiff.

State of California,
County of Los Angeles,—ss.

F. F. Doane, being by me first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; and that the

same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

(Signed) F. F. DOANE.

Subscribed and sworn to before me this 24th day of November, 1915.

[Seal] MAE L. GORDON,
Notary Public in and for said Los Angeles County,
California.

[Endorsed]: No. 18871. Filed Nov. 20, 1915. D.
M. Barnwell, Clerk. By Louis F. Ryan, Deputy.
[105]

State of California,
County of Fresno,—ss.

I, D. M. Barnwell, County Clerk and ex-officio clerk of the Superior Court in and for said Fresno County, do hereby certify the foregoing to be a full, true and correct copy of the original complaint in the therein entitled matter now on file in my office, and of the whole of such original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court, this 1st day of May, 1916.

[Seal] (Signed) D. M. BARNWELL,
County Clerk and Ex-officio Clerk of the Superior
Court of said County.

By Louis F. Ryan,
Deputy Clerk. [106]

[Ten-cent Revenue stamp canceled.]

*In the Superior Court of the County of Fresno, State
of California.*

No. 18,871—Dept. 2.

Plaintiff,

vs.

LOS ANGELES TRUST & SAVINGS BANK, a
Corporation, H. N. COFFIN, JOHN McMIL-
LAN, and F. H. PARSONS, as Trustees; H.
N. COFFIN, JOHN McMILLAN and F. H.
PARSONS, and JOHN DOE, RICHARD
ROE, and JOHN ROE and RICHARD DOE,
Defendants.

Action brought in the Superior Court of the County
of Fresno, State of California, and the Com-
plaint filed in the office of the clerk of said
County of Fresno.

The People of the State of California Send Greet-
ing to Los Angeles Trust & Savings Bank, a corpora-
tion; H. N. Coffin, John McMillan and F. H. Parsons,
as Trustees, H. N. Coffin, John McMillan and F. H.
Parsons, and John Doe, Richard Roe, and John Roe
and Richard Doe, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR
and answer the Complaint in an action entitled as
above, brought against you in the Superior Court of
the said County of Fresno, State of California,
within ten days after the service on you of this Sum-
mons—if served within this county; or within thirty
days if served elsewhere.

And you are hereby notified that unless you appear

and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

GIVEN under my hand and the seal of the Superior Court of the said County of Fresno, State of California, this 26th day of November, A. D. 1915.

[Seal]

D. M. BARNWELL,
Clerk.

By Louis F. Ryan,
Deputy Clerk. [107]

GEO. R. FREEMAN,
Attorney for Plaintiff.

State of California,
County of Fresno,—ss.

I, D. M. Barnwell, County Clerk and ex-officio clerk of the Superior Court in and for said Fresno County, do hereby certify the foregoing to be a full, true and correct copy of the original Summons issued in the therein entitled matter, and of the whole of such original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Superior Court this 1st day of May, 1916.

[Seal]

D. M. BARNWELL,
County Clerk and Ex-officio Clerk of the Superior
Court of said County.

By Louis F. Ryan,
Deputy Clerk.

[Ten-cent Revenue Stamp Attached and Canceled. [108]

RETURN.

State of California,

County of Los Angeles,—ss.

B. O. Miller, being duly sworn, deposes and says: That he is and was at the time of the service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within-entitled action; that he personally served the within Summons on the 30th day of November, A. D. 1915, on Los Angeles Trust and Savings Bank, a corporation, one of the defendants therein named, by delivering to said defendant personally in the County of Los Angeles, Calif., a copy of said Summons, and complaint, delivering same to W. R. Hervey, its Vice-president and manager of said Los Angeles Trust and Savings Bank, attached to a copy of the Complaint in the action therein mentioned.

(Signed) B. O. MILLER.

Subscribed and sworn to before me this 30th day of November, A. D. 1915.

(Signed) MAE L. GORDON,
Notary Public in and for the County of Los Angeles,
State of California. [109]

[Indorsed]: No. 18,871. Superior Court, County of Fresno. F. F. Doane, Plaintiff, vs. Los Angeles Trust & Savings Bank et al., Defendants. Summons. Received ——. A.-51-Eq. U. S. Dist. Ct. So. Dist. Cal. No. Div. California Land Co. v. F. F. Doane. Defts. Exh. 1. Filed May 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [110]

**Defendant's Exhibit 2—Copies of Notices of
Rescission, etc.**

LOS ANGELES TRUST & SAVINGS BANK,
Trust Department.

Los Angeles, Cal., 2/26/15, 1914.

Received from W. I. Hollingsworth, three notices
in re Dos Palos Trusts 1781 and 2247. Revoking
Power of Sale in Trust 1781; Revoking Power of
Sale Trust 2247 and Revoking Power of Atty. in Col-
lateral Assignment.

LOS ANGELES TRUST & SAVINGS BANK.

By J. D. CARSON,
Asst. Trust Officer.

No. — [111]

Form 1548.

REGISTRY RETURN RECEIPT.

RECEIVED from the postmaster registered arti-
cle, the original of which appears on the reverse side
of this card. Date of Delivery, Feb. 27, 1915. —
191—.

(To be filled in by person signing receipt)

When delivery is made to an agent of the ad-
dressee, both addressee's name and agent's signature
must appear in this receipt.

(Signed) F. H. PARSONS,
(Signature or name of addressee.)

(Signed) W. F. TUCKER,
(Signature of addressee's agent.)

Registered matter, the delivery of which has not
been restricted by the sender or the addressee, is de-

liverable to any responsible person who customarily receives ordinary mail of the addressee. (See sec. 935, P. L. & R.) When the above receipt has been properly signed it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

(REVERSE SIDE)

POSTOFFICE DEPARTMENT, OFFICIAL
BUSINESS.

Original Reg. No. 79133.

Penalty for private use to avoid payment of postage
\$300.

Postmaster at Delivering Office

• (STAMPED)

BOISE

Feb. 27, 15.

11-30 A. M.

IDAHO

(CANCELLATION STAMP)

and date of delivery.

RETURN TO

W. I. Hollingsworth & Co.,

(Name of Sender)

Street and Number

or Post Office Box.

6 & Hill,

LOS ANGELES,

CALIFORNIA.

The postmaster who delivers the registered article must see that this card is properly signed, legibly

postmarked and mailed to the sender, without envelope or postage. [112]

No. 79133

RECEIPT FOR REGISTERED MAIL.

This receipt represents a letter or parcel registered at the postoffice indicated by postmark. Inquiries concerning registered mail should state the number of the article, date of its registration, and the name and addresses of the sender and addressee. The sender of the article represented by this receipt should write the name and address of the addressee on the reverse side.

(STAMPED)
LOS ANGELES
(STA. C.)
Cal. Registered.
Feb. 24, 1915.

RETURN RECEIPT DEMANDED.

1 ——— class postage prepaid. Postmaster, per
JWB.

[Indorsed]: Doane personal revocation to Idaho
sent to Parsons. [113]

Form 1548.

REGISTRY RETURN RECEIPT.

RECEIVED from the postmaster registered article, the original number of which appears on the reverse side of this card.

(Stamped) Feb. 27, 1915.

Date of delivery, 2/27, 1915.

When delivery is made to an agent of the addressee,

both addressee's name and agent's signature must appear in this receipt.

(Signed) JOHN M. MILLER,

(Signature or name of addressee.)

_____,
(Signature of addressee's agent.)

Registered matter, the delivery of which has not been restricted by the sender or the addressee, is deliverable to any responsible person who customarily receives ordinary mail of the addressee. (See sec. 935 P. L. and R.)

When the above receipt has been properly signed, it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage. [114]

(REVERSE SIDE.)

POST OFFICE DEPARTMENT OFFICIAL
BUSINESS.

ORIGINAL REG. No. 79158.

Penalty for Private Use to Avoid Payment of Postage \$300.

Postmaster of Delivering Office.

(POSTMARKED)

BOISE

Feb. 27-15,

11-30 A. M.

IDAHO.

(CANCELLATION STAMP)

and Date of Delivery.

RETURN TO:

W. I. Hollingsworth & Co.,

(Name of sender.)

Street and Number

or Post Office Box.

6th & Hill St.

LOS ANGELES,

CALIFORNIA.

The postmaster who delivers the registered article must see that this card is properly signed, legibly postmarked, and mailed to the sender, without envelope or postage. [115]

(RECEIPT FOR REGISTERED MAIL
ATTACHED.)

RECEIPT FOR REGISTERED MAIL.

No. 79158.

This receipt represents a letter or parcel registered at the postoffice indicated by postmark. Inquiries concerning registered mail should state the number of the article, date of its registration, and the name and address of the sender and addressee. The sender of the article represented by this receipt should write the name and address of the addressee on the reverse side.

(STAMPED) Los Angeles, (Sta. C.) Cal. Feb. 24, 1915. Registered.

RETURN RECEIPT DEMANDED.

——— class postage prepaid. Postmaster, per WR.
LPC.

(REVERSE SIDE.)

2/24/15 Revocation by Doane personally on Mc-Millan. [116]

Form 1548.

(REGISTRY RETURN RECEIPT.)

RECEIVED from the postmaster registered article, the original of which appears on the reverse side of this card.

(Stamped) Feb. 27, 1915.

Date of delivery. Feby. 27th, 1915.

(To be filled in by person signing receipt.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

(Signed) H. N. COFFIN,

(Signature of name of addressee.)

(Signed) K. N. COFFIN,

(Signature of addressee's agent.)

Registered matter, the delivery of which has not been restricted by the sender or the addressee, is deliverable to any responsible person who customarily receives the ordinary mail of the addressee. (See sec. 935 P. L. and R.)

When the above receipt has been properly signed, it must be postmarked with the name of the delivering office and actual date of delivery and mailed to its address, without envelope or postage. [117]

(REVERSE SIDE OF CARD.)

POST OFFICE DEPARTMENT OFFICIAL
BUSINESS.

ORIGINAL REG. No. 79159.

Penalty for Private Use to Avoid Payment of Post-
age \$300.

Postmaster of Delivering Office.

(Cancellation Stamp.)

and Date of Delivery.

(POSTMARKED)

BOISE

Feb. 27-15,

11-30 A. M.

IDAHO.

RETURN TO:

W. I. Hollingsworth & Co.,

Street and Number,

or Post Office Box.

6th & Hill St.,

LOS ANGELES,

CALIFORNIA.

The postmaster who delivers the registered article must see that this card is properly signed, legibly postmarked, and mailed to the sender, without envelope or postage. [118]

(RECEIPT FOR REGISTERED MAIL
ATTACHED TO CARD.)

RECEIPT FOR REGISTERED MAIL.

No. 79159.

This receipt represents a letter or parcel registered at the postoffice indicated by postmark. Inquiries

concerning registered mail should state the number of the article, date of its registration, and the names and addresses of the sender and addressee. The sender of the article represented by this receipt should write the name and address of the addressee on the reverse side.

TPC
POSTMARKED

Los Angeles,
(Sta. C.)
Cal.

Registered.

RETURN RECEIPT DEMANDED.

——— class postage prepaid. Postmaster per W. L.

[Indorsed]: 2/24/15. Revocation by Doane personally on H. N. Coffin. [119]

State of California,
County of Los Angeles,—ss.

B. O. Miller, being first duly sworn, deposes and says that, on the 26th day of February, 1915, he served on the Los Angeles Trust and Savings Bank, a corporation of Los Angeles, California, a copy of the notice signed by F. F. Doane rescinding the power of sale under Trust Agreement #1781, issued by said Los Angeles Trust and Savings Bank in connection with the purchase of a certain 15,160 acre tract of land at South Dos Palos, Fresno County, California, by said F. F. Doane from H. N. Coffin, John McMillan and F. H. Parsons, Trustees, of Boise, Idaho, by delivering said notice of rescission to J. D. Carson,

Assistant Trust Officer of said Los Angeles Trust and Savings Bank.

(Signed) B. O. MILLER.

Subscribed and sworn to before me this 28th day of April, 1916.

[Notarial Seal] (Signed) MAE L. GORDON,
Notary Public in and for the County of Los Angeles,
State of California. [120]

State of California,
County of Los Angeles,—ss.

B. O. Miller, being first duly sworn, deposes and says that, on February 24th, 1915, he mailed to H. N. Coffin, Boise, Idaho, by registered mail, a copy of the notice of rescission by F. F. Doane to the Los Angeles Trust and Savings Bank, a corporation of Los Angeles, California, rescinding the power of sale under Trust #1781, issued by said Los Angeles Trust and Savings Bank, covering the purchase by F. F. Doane from John McMillan, F. H. Parsons and H. N. Coffin, Trustees, of Boise, Idaho, of a certain 15,160 acre tract of land at South Dos Palos, Fresno County, California.

(Signed) B. O. MILLER.

Subscribed and sworn to before me this 28th day of April, 1916.

[Notarial Seal]

(Signed) MAE L. GORDON,
Notary Public in and for the County of Los Angeles, State of California. [121]

State of California,
County of Los Angeles,—ss.

B. O. Miller, being first duly sworn, deposes and says that, on February 24th, 1915, he mailed to John McMillan, Boise, Idaho, by registered mail, a copy of the notice of rescission by F. F. Doane to the Los Angeles Trust and Savings Bank, a corporation of Los Angeles, California, rescinding the power of sale under Trust #1781, issued by said Los Angeles Trust and Savings Bank, covering the purchase by F. F. Doane from John McMillan, F. H. Parsons and H. N. Coffin, Trustees, of Boise, Idaho, of a certain 15,160 acre tract of land at South Dos Palos, Fresno County, California.

(Signed) B. O. MILLER.

Subscribed and sworn to before me this 28th day of April, 1916.

[Notarial Seal]

(Signed) MAE L. GORDON,

Notary Public in and for the County of Los Angeles, State of California. [122]

State of California,
County of Los Angeles,—ss.

B. O. Miller, being first duly sworn, deposes and says that, on February 24th, 1915, he mailed to H. F. Parsons, Boise, Idaho, by registered mail, a copy of the notice of rescission by F. F. Doane to the Los Angeles Trust and Savings Bank, a corporation of Los Angeles, California, rescinding the power of sale under Trust #1781, issued by said Los Angeles Trust and Savings Bank, covering the purchase by F. F. Doane from John McMillan, F. H. Parsons

and H. N. Coffin, Trustees, of Boise, Idaho, of a certain 15,160 acre tract of land at South Dos Palos, Fresno County, California.

(Signed) B. O. MILLER.

Subscribed and sworn to before me this 28th day of April, 1916.

[Notarial Seal]

(Signed) MAE L. GORDON,
Notary Public in and for the County of Los Angeles,
State of California. [123]

To Los Angeles Trust & Savings Bank, a corporation, H. N. Coffin, John McMillan, F. H. Parsons, and H. N. Coffin, John McMillan, and F. H. Parsons, as trustees and designated in the instrument hereinafter mentioned as payees therein, and to all persons whom this may concern:

Whereas, heretofore on the 25th day of February, 1913, there was conveyed to Los Angeles Trust & Savings Bank, a corporation, the following described property situate in Fresno County, State of California, particularly described as follows, to wit:

Sections ten (10), Eleven (11), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Twenty (20), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), the north half of section Twenty-eight (28), and all of sections thirty-four (34), Thirty-five (35), and Thirty-six (36) in Township Twelve (12) South, range Twelve (12) East, M. D. M.

Also Section One (1), the north half of the north-

east quarter, the north half of the northwest quarter; the south half of the southeast quarter and the southeast quarter of the southwest quarter of section Six (6); the south half of section eleven (11), all of Sections twelve (12), Fifteen (15), Sixteen (16), and Twenty-two (22), the southwest quarter of section Thirty-three (33), and all of section thirty-four (34), in Township Thirteen (13) South, range Twelve (12) east, M. D. M. [124]

Excepting therefrom a strip of land two hundred (200) feet in width, being One hundred (100) feet on each side of the center line of the Canal known as the San Joaquin and Kings River Canal and Irrigation Company's Outside Canal, as the same is or shall be finally located through and across Section twelve (12) and the north half of sections ten (10) and eleven (11) in township twelve (12) south, range twelve (12) East, viz.: Beginning at a point on the Eastern boundary of the Southeast quarter of said section twelve (12); thence in a northwesterly direction, through said Section to a point on the western boundary of its northwest quarter; thence in a northwesterly direction through the north half of sections Nine (9), Ten (10) and Eleven (11) to a point in Section Nine (9) near the middle of the North boundary thereof; as conveyed to the said San Joaquin and Kings River Canal and Irrigation Company, a corporation, by Henry Miller et al., by deed recorded in Book 201, page 164 of Deeds, hereinbefore recited. Subject to reservations for rights of way mentioned in said Declaration of Trust.

And whereas said conveyance to said Los Angeles

Trust & Savings Bank is absolute in form and purports to convey to said Bank the absolute legal and equitable title to all of said property subject to the easements and rights of way therein mentioned, nevertheless said deed and grant was intended to convey said property to said Bank for the benefit of F. F. Doane, his heirs, legatees, devisees, administrators, executors, successors, [125] and assigns, and whose respective interests are as set forth in that certain instrument executed by the Los Angeles Trust & Savings Bank, H. N. Coffin, F. H. Parsons, trustees, and F. F. Doane, beneficiary, and John McMillan, dated August 12, 1914, and designated a Declaration of Trust purporting to secure the payment of \$379,000, and

Whereas, the said Los Angeles Trust & Savings Bank paid no consideration for said property and has no interest therein except as in said instrument designated a Declaration of Trust.

And Whereas, said real property above described is held by said Los Angeles Trust & Savings Bank as security for the payment to H. N. Coffin, John McMillan and F. H. Parsons, trustees, therein named as Payees, in the sum of \$379,000, with interest at the rate of six per cent per annum payable semi-annually, from March 1, 1913, and

Whereas, there has been paid to the said trustee all payments that are now due under the terms of said instrument, to wit: \$100,000 and interest, and

Whereas it is provided in said instrument to which reference is hereby made, and is made a part thereof, and in particular reference is made to the sixth par-

agraph thereof, which said paragraph six is in the words and figures following, to wit:

“Sixth: In the event that the said F. F. Doane shall fail to pay or cause to be paid to the Trustee sufficient moneys in accordance with the terms of this trust, to enable said Trustee to meet the payments due to the payees under this Trust at the times and in the amounts [126] hereinbefore set forth, then, on demand of said payees or assigns, and without demand by the said Trustee for the payment of any of said sums, the said Trustee shall sell the above granted property or such parts thereof as it shall deem necessary to sell to accomplish the objects of this trust, such demand for sale by the payees shall be deemed conclusive notice of an election to declare the whole amount of the principal purchase price and interest immediately payable, to which power of election the said F. F. Doane hereby agrees. Said sales shall be made as follows:

The said Trustee shall publish notice of the time and place of such sale with a description of the property to be sold, at least once a week for four successive weeks in some newspaper published in Los Angeles County, California, and may postpone such sale by public announcement at the time and place of sale so advertised, but such postponement shall not exceed ten days; and on the day of sale so advertised, or on the day to which such sale may be postponed, said Trustee may sell said property or any portion thereof at public auction at any place in Los Angeles, California, to the highest bidder for cash in lawful money, and the payees hereunder may purchase at

such sale. Such sale may be made by any officer of the Trustee authorized by it to conduct similar sales. Upon such sale said Trustee shall execute and deliver to the purchaser a deed to the property sold without any covenants, and from the proceeds shall pay: [127]

1st. Expense of such sale, and the compensation to the Trustees, in accordance with the terms hereinabove set forth;

2d. To the payees hereunder the amount unpaid on said purchase price, with accrued interest;

3d. The balance of such proceeds to the order of F. F. Doane.

In the event of sale of said property or any part thereof, and execution of a deed therefor under these trusts, then the recitals therein of any default in payments, publication of notice of sale, demand that sale should be made, postponement of sale, terms of sale, sale, purchaser, payment of purchase money, and of any other fact or facts affecting the regularity or validity of such sale, shall be conclusive proof of such matters and of all other facts recited therein against said F. F. Doane, and all other persons; and the receipt for the purchase money contained in such deed shall discharge the said purchaser from all obligation to see to the proper application of the purchase money. Every stipulation herein shall insure to the benefit of the successors and assigns of the respective parties hereto."

Now, therefore, the undersigned, F. F. Doane, for divers good causes and considerations has revoked,

countermanded, annulled, canceled, and made void, and by these presents does revoke, countermand, annul, cancel, and make void all of the [128] powers, authority and conditions set forth in said paragraph six of said instrument as aforesaid hereinbefore referred to, and hereby expressly revokes all authority of said trustee to sell all or any portion of the above described property.

IN WITNESS WHEREOF, I have hereunto set my hand this 23d day of February, one thousand nine hundred and fifteen.

(Signed) F. F. DOANE.

State of California,
County of Los Angeles,—ss.

On this 23 day of February, A. D., 1915, before me Mae L. Gordon, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared F. F. Doane, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Notarial Seal]

(Signed) MAE L. GORDON,

Notary Public in and for said County and State of
California. [129]

The undersigned hereby approves and consents to the revocation as hereinabove set forth.

Dated this 23d day of February, 1915.

(Signed) W. I. HOLLINGSWORTH,
W. I. HOLLINGSWORTH AND COMPANY,
By W. I. HOLLINGSWORTH,
President.
By B. O. MILLER,
Secretary.

State of California,
City and County of San Francisco,—ss.

On this 25th day of February, in the year One Thousand Nine Hundred and Fifteen before me, M. V. Collins, a Notary Public in and for said City and County residing therein, duly commissioned and sworn, personally appeared W. I. Hollingsworth, known to me to be the person described in, whose name is subscribed to, and who executed the within and annexed instrument and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year above written.

[Notarial Seal]

(Signed) M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California. [130]

State of California,
City and County of San Francisco,—ss.

On this 25th day of February, in the year one thousand nine hundred and fifteen before me, M. V. Collins, a Notary Public in and for said City and County, residing therein, duly commissioned and

sworn, personally appeared W. I. Hollingsworth known to me to be the President of W. I. Hollingsworth and Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Notarial Seal]

(Signed) M. V. COLLINS,

Notary Public in and for the City and County of
San Francisco, State of California. [131]

State of California,
County of Los Angeles,—ss.

On this 23 day of February, A. D. 1915, before me, Mae L. Gordon, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared B. O. Miller, known to me to be the Secretary of the W. I. Hollingsworth and Company, the corporation that executed the within instrument, known to me to be the person who executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Notarial Seal] (Signed) MAEL GORDON,
Notary Public in and for said County and State.
[132]

[Endorsed]: Return to W. I. Hollingsworth & Co.,
6th and Hill Sts., Los Angeles, Cal. (Index) 4211.
Abstract Co. N Indexed C Comparer — Copyist S
Compared G Paged — H. W. C. L. McP. Filed
for Record at the Request of W. I. Hollingsworth &
Co., March 1, A. D., 1915, at 40 min. past 1 o'clock
P. M. and Recorded in Vol. 31 of Miscellaneous pg.
283 et seq. Fresno County Records, R. N. Barstow,
County Recorder. By R. A. Fleshner, Deputy Re-
corder. 22/3.40. G. R. Freeman, Attorney at Law,
Corona National Bank Building, Phone Home 231,
Corona, California. A-51—Eq. U. S. Dist. Court,
So. Dist. Cal. No. Div. California Land Co., vs. F. F.
Doane. Deft's Exh. 2. Filed May 1, 1916. Wm.
M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy
Clerk. [133]

*In the United States District Court in and for the
District of California, Northern Division.*

A-51—EQUITY.

CALIFORNIA LAND COMPANY,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Petition on Appeal and Assignment of Errors.

**PETITION ON APPEAL TO THE CIRCUIT
COURT OF APPEALS AND ASSIGNMENT
OF ERRORS.**

The above-named defendant, F. F. Doane, believing himself aggrieved by the final decree in the above-entitled cause, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript of such part of the record as the parties to this cause shall *be* praecipe duly indicate, together with the exhibits and evidence herein stated in cimple and condensed narrative form, so far as it relates to any of the claims on which error is predicated or any matter indicated by the defendant and also the judgment herein rendered, all duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had which may be proper in the premises. [134]

And the defendant, F. F. Doane, hereby assigns the errors asserted and intended to be urged as follows:

1st. That the Court was in error in overruling the motion of the defendant to dismiss the action for want of jurisdiction based upon the ground that there was pending in the state court of California an action by the defendant herein against the predecessors in interest of the plaintiff herein; said motion being based upon the further ground that the corporation plaintiff herein was formed for the purpose of ousting said state court of jurisdiction to try the issues involved in this case, and for the purpose of cre-

ating a case cognizable with the United States District Court;

2d. That the Court was in error in declaring the declaration of trust, exhibit "A" attached to defendant's answer, to be a trust deed.

3d. The Court was in error in declaring that the defendant had no interest in said property as set forth in the decree or judgment herein.

WHEREFORE, the defendant, F. F. Doane, prays that said final decree of the District Court of the United States for the Southern District of California, Northern Division, sustaining the plaintiff's bill may be reversed and that said court may be ordered to enter a decree in accordance with the prayers in said answer dismissing said bill, or in such other form as to said Circuit Court of Appeals for the Ninth Circuit shall deem just.

Dated this 21 day of June, 1916.

F. F. DOANE.

By G. R. FREEMAN,

His Attorney. [135]

[Indorsed]: No. A-51—Equity. United States District Court, Southern District of California, Northern Division. California Land Co., Plaintiff and Appellee, vs. F. F. Doane, Defendant and Appellant. Petition on Appeal and Assignment of Errors. Filed Jun. 28, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. G. R. Freeman, Attorney at Law, Corona, California. [136]

*In the United States District Court in and for the
Southern District of California, Northern Division.*

A-51—EQUITY

CALIFORNIA LAND COMPANY,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Order Allowing Appeal and Fixing Bond.

In the above-entitled cause, the defendant having filed his petition for order allowing appeal from the final decree of this court made and entered on the 15th day of May, 1916, in favor of the plaintiff herein as more fully set forth in said decree, together with his assignment of errors,

Now, on motion of G. R. Freeman, Esq., solicitor for the defendant, it is ordered that said appeal be and it is hereby allowed the defendant to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered as aforesaid, and the amount of the defendant's bond on said appeal be and the same is hereby fixed at the sum of \$300, the same to act as bond for costs upon said appeal.

(Signed) OSCAR A. TRIPPET. [137]

[Indorsed]: No. A-51—Equity. United States District Court, Southern District of California, Northern Division. California Land Co., Plaintiff &

Appellee, v. F. F. Doane, Defendant & Appellant.
Order Allowing Appeal and Fixing Amount of Bond.
Filed Jun. 28, 1916. Wm. M. Van Dyke, Clerk. By
Leslie S. Colyer, Deputy Clerk. G. R. Freeman, At-
torney at Law, Corona, California. Eq. O Bk—
[138]

*In the United States District Court in and for the
Southern District of California, Northern Divi-
sion.*

A-51—EQUITY

CALIFORNIA LAND COMPANY,

Plaintiff and Appellee,

vs.

F. F. DOANE,

Defendant and Appellant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, F. F. Doane, of Los Angeles, County of Los
Angeles, State of California, as principal, and E. A.
Weber and B. O. Miller, of Los Angeles, County of
Los Angeles, State of California, as sureties, are held
and firmly bound unto California Land Company at
Boise City, Ada County, State of Idaho, in the full
and just sum of Three Hundred Dollars, to be paid to
the said California Land Company, its certain attor-
ney, executors, administrators, or assigns; to which
payment well and truly to be made we bind ourselves,
our heirs, executors, and administrators, jointly and
severally, by these presents.

Signed and sealed with our seals and dated this 23d day of June, one thousand nine hundred and sixteen.

Whereas, lately at a District Court of the United States for the Southern District of California, Northern Division, [139] in a suit in equity pending in said court between said California Land Company, and said F. F. Doane, a decree was entered against the said F. F. Doane and the said F. F. Doane having obtained an appeal to remove said cause to the United States Circuit Court of Appeals of the Ninth Circuit to reverse the decree in the aforesaid suit, and a citation directed to the said California Land Company, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, on the 23 day of June, 1916.

Now, the condition of the above obligation is such that if the said F. F. Doane shall prosecute its bill to effect and answer all damages and costs, if it fail to make its appeal good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) F. F. DOANE. (Seal)

(Signed) E. A. WEBER. (Seal)

(Signed) B. O. MILLER. (Seal)

United States of America,
State of California,
County of Los Angeles,—ss.

E. A. Weber and B. O. Miller, whose names are subscribed as sureties to the within bond, being severally duly sworn, each for himself, deposes and says: that he is a resident and freeholder and householder

in said Los Angeles County; that he is worth the amount for which he becomes surety on said bond, over [140] and above all debts and liabilities, in unencumbered property, situate within this State, exclusive of property exempt from execution and forced sale.

(Signed) E. A. WEBER.

(Signed) B. O. MILLER.

State of California,
County of Los Angeles,—ss.

On this 23d day of June, A. D., 1916, before me, Mae L. Gordon, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared E. A. Weber and B. O. Miller, known to me to be the person whose name *are* subscribed to the within instrument, and acknowledged to me that *they* executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Notarial Seal] (Signed) MAEL GORDON,
Notary Public in and for said County and State of California. [141]

Approved: 6/27/16.

TRIPPET,
Judge.

[Endorsed]: No. A-51—Equity. United States District Court, Southern District of California, Northern Division. California Land Co., Plaintiff, Appellee, v. F. F. Doane, Defendant and Appellant. Bond on Appeal. Filed Jun. 28, 1916. Wm. M.

Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. G. R. Freeman, Attorney at Law, Corona, California. [142]

In the United States District Court in and for the Southern District of California, Northern Division.

A-51—EQUITY.

CALIFORNIA LAND COMPANY,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Praeceptum for Transcript.

The defendant, appellant, indicates the following as the portions of the record to be incorporated in the record on the transcript of appeal.

1. Bill of Complaint.
2. Answer.
3. Opinion of Court Sustaining Bill.
4. Final Decree.
5. Plaintiff's Exhibits as follows, "A," "B," "C," and "D."
6. Stipulation of Facts.
7. Petition on Appeal and Assignment of Errors.
8. Bond on Appeal.
9. Praeceptum.
10. Citation on Appeal.
11. Defendant's Exhibits "1" and "2."

G R. FREEMAN,

Attorney for Defendant. [143]

[Indorsed]: No. A-51—Equity. United States District Court, Southern District of California, Northern Division. California Land Co., Plaintiff and Appellee, v. F. F. Doane, Defendant and Appellant. Praeipe. Filed Jun. 28, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. G. R. Freeman, Attorney at Law, Corona, California. [144]

In the District Court of the United States of America, in and for the Southern District of California, Northern Division.

No. A-51—EQUITY.

CALIFORNIA LAND COMPANY,

Plaintiff,

vs.

F. F. DOANE,

Defendant.

Clerk's Certificate to Transcript on Appeal.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, DO HEREBY CERTIFY the foregoing one hundred forty-four typewritten pages, numbered from 1 to 144 inclusive, and comprised in one volume, to be a full, true and correct copy of the Judgment-roll, Stipulation as to Facts, Conclusions of the Court on Final Hearing, Plaintiffs Exhibits "A," "B," "C" and "D," Defendants Exhibits 1 and 2, Petition on Appeal and Assignment of Errors, Order Allowing Appeal and Fixing Bond, Bond on Appeal, and Praeipe for

Transcript of the Record in the above and therein numbered cause, and that the same together [145] constitute the record in said cause, as specified in the said Praecipe filed in my office on behalf of Appellant by his attorney of record.

I further certify that the cost of the foregoing transcript of record on appeal is \$57.40, the amount whereof has been paid me by F. F. Doane, the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, on this 23d day of August, in the year of our Lord one thousand nine hundred and sixteen, and of our Independence the one hundred and forty-first.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
8/23/16. L. S. C.] [146]

[Endorsed]: No. 2854. United States Circuit Court of Appeals for the Ninth Circuit. F. F. Doane, Appellant, vs. California Land Company, a Corporation, Appellee. Transcript of Record.

Upon Appeal from the United States District Court
for the Southern District of California, Northern
Division.

Filed August 31, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

(No. A-51—EQ. N. D.)

F. F. DOANE,

Appellant,

vs.

CALIFORNIA LAND COMPANY,

Appellee.

**Order Extending Time to September 1, 1916, to File
Record.**

Good cause appearing therefor, it is hereby ordered that the time for filing the record and docketing the cause in the United States Circuit Court of Appeals in the above-entitled cause be extended to and including the 1st day of September, 1916.

Los Angeles, July 27, 1916.

TRIPPET,
District Judge.

[Endorsed]: (No. A-51—Eq. N. D.) United States Circuit Court of Appeals for the Ninth Circuit. F. F. Doane, Appellant, vs. California Land

Company, Appellee. Order Extending Time to File Record, etc.

No. 2854. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to September 1, 1916, to File Record thereof and to Docket Case. Filed Jul. 29, 1916. F. D. Monckton, Clerk. Refiled Aug. 31, 1916. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. F. DOANE,

Appellant,

vs.

CALIFORNIA LAND COMPANY, a Corporation,
Appellee.

Appellant's Brief

Upon Appeal from the United States District for the
Southern District of California, Northern Division

Oscar A. Trippet, Judge

Filed

OCT 4 - 1916

F. D. Monckton,
Clerk.

G. R. Freeman, Attorney for Appellant.
Corona, California.

United States
Circuit Court of Appeals

For the Ninth Circuit.

F. F. DOANE,

Appellant,

vs.

CALIFORNIA LAND COMPANY, a Corporation,
Appellee.

Appellant's Brief

Upon Appeal from the United States District for the
Southern District of California, Northern Division

Statement of the Case

In December, 1912, F. F. Doane appellant herein, entered into a contract to purchase the property involved (tr. 48), and it was agreed that Doane should have possession of the property if he paid \$55,000 on the first day of March, 1913, which said sum of \$55,000 was so paid.

Thereafter on the 25th of February, 1913, a deed was given purporting to convey to the Los Angeles Trust & Savings Bank, this property (see Exhibit "A", tr. 19).

One year and six months thereafter, to-wit: on

August 14, 1914 the parties entered into an agreement and executed the instrument designated as a Declaration of Trust (Exhibit "A", Tr. 19), thereby merging the contract to purchase into this declaration;

That thereafter there was paid as principal and interest the sum of \$169,580 (answer, Tr. 13);

That prior to default of payment, to-wit: on February 26, 1915, there was served in writing upon the Los Angeles Trust & Savings Bank, and upon Coffin, Parsons and McMillan as trustees for the ten persons mentioned in the stipulation of facts, a revocation of the power to sell as contained in paragraph Six of said Exhibit "A" (Tr. 110-115), which revocation was received by said Parsons, McMillan and Coffin on the 27th of February, 1915 (Tr. 100-110);

That there was paid at this time the sum of \$100,000 on the principal (Defendant's Exhibit "2", Tr. 112, plaintiff's Exhibit "C" Tr. 69);

On the first day of April, 1915, there was additional time given for the other payments (Plaintiff's Exhibit "B", Tr. 64).

November 20, 1915, Doane, appellant herein brought an action in the Superior Court of Fresno County, California, against the Los Angeles Trust & Savings Bank, Parsons, McMillan and Coffin, as trustees, et al., praying that the deed executed by Parsons, Coffin and McMillan to the Los Angeles Trust & Savings Bank be declared a mortgage and that the plaintiff, Doane, have the right to redeem; (Defendant's Exhibit "1").

On the 29th of December, 1915, there was filed with the County Recorder of Fresno County, California, a notice of said action, (Tr. 15, paragraph 4; Tr. 32).

On the 23rd of December, 1915, the Los Angeles Trust & Savings Bank executed to Parsons, Coffin and McMillan, trustees, predecessors in interest of appellee herein at the time of the trial of this action, a deed to the property involved (plaintiff's Exhibit "C", Tr. 68).

On the 30th of December, 1915, the appellee corporation, California Land Company, was formed under the laws of the state of Idaho, and on the 8th of January, 1916, the articles of incorporation were filed with the County Recorder of Ada County, Idaho, and filed on the same day with the Secretary of State of Idaho; on the 17th of February, 1916, a certified copy of the Articles of Incorporation were filed with the Secretary of State of the state of California, and on the 3rd day of March, 1916, the same was filed with the County Recorder of Fresno County, California;

On the 12th day of February, 1916, Parsons, Coffin and McMillan trustees, executed a deed to the property involved to the appellee herein;

On the 15th day of February 1916, the Bill in Equity herein was filed by the Appellee herein against the Appellant.

Thus it will be noted that this corporation was formed immediately after the filing of the action by Doane in the State court, and this action brought in

the District Court of the United States as soon as due course of business would permit, taking into consideration the distances, mails, etc.

Doane filed his answer herein setting up the facts as herein before stated, and the matter came on for hearing on May 1, 1916.

At the time of the hearing a stipulation of facts was filed, (Tr. 45), and among the reasons therein given by the appellee for the formation of said corporation, on page 47 of the transcript was the following:

“If it became necessary or desirable they (appellee) could in that event, having the necessary diversity of citizenship, invoke the jurisdiction of the United States Court in any litigation commenced by them or by any other persons against said corporation.”

The appellant in open court moved to dismiss the action based upon 36 U. S. Statutes 1098, which provides:

“If any suit is commenced in a District Court or removed from a state court to a district court of the United States and it shall appear to the satisfaction of the District Court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the District Court or that the parties to said suit have been improperly or collusively made or joined either as plaintiff or defendant for the purpose of creating a case cognizable or removable under its jurisdiction,

the District Court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to the court shall seem just."

The motion was also made upon the ground that there was pending in the state court of California an action by the defendant and against the predecessors in interest of the plaintiff involving the same issues as involved in the suit in the District Court.

The motion was denied, and the stipulation of facts and the respective instruments hereinbefore referred to were introduced in evidence.

The Court after hearing the case gave the conclusions on page 50 of the transcript, in which he construed the declaration of trust to be a trust deed, and that the appellant should have made a tender of the amount due in order to have any standing in a court of equity.

SPECIFICATIONS OF ERROR

The appellant assigns as errors the following:

1st. That the Court was in error in overruling the motion of the defendant to dismiss the action for want of jurisdiction based upon the ground that there was pending in the state court of California an action by the defendant (appellant herein) against the predecessor in interest of the plaintiff (appellee herein); said motion being based upon the further ground that the corporation, plaintiff (appellee) herein was formed for the purpose of ousting said state court of jurisdiction to try the issues involved

in this case, and for the purpose of creating a case cognizable with the United States District Court;

2nd. That the Court was in error in declaring the declaration of trust, exhibit "A" attached to defendant's answer, to be a trust deed;

3rd. The Court was in error in declaring that the defendant had no interest in said property as set forth in the decree or judgment herein.

BRIEF OF THE ARGUMENT UPON THE FOREGOING SPECIFICATIONS OF ERROR

As to SPECIFICATION No. 1 upon the motion to dismiss for want of jurisdiction, and upon the further ground that the corporation was formed for the purpose of ousting the state court of jurisdiction of the case therein pending, it will be noticed from the foregoing statement of facts and the exhibits introduced in evidence at the time of this action that the defendants in the action pending in the state court other than the Los Angeles Trust & Savings Bank are the sole incorporators of the California Land Company, plaintiff herein; that the organization of the corporation and the bringing of this action was done as soon as it could be done in the due course of business. In other words, beginning at the time of the formation and the filing of the articles of incorporation of the plaintiff herein to the time of filing the complaint herein, it was done as quickly as it could be done, considering the mails and the distance between the points in which filings were necessary to be made.

The object and purposes of the corporation were

to hold real estate, subdivide, plat, and improve the same for the purpose of sale or otherwise.

The land in question is a large tract of land in Fresno County, particularly valuable for its subdivision purposes, and for farming purposes. The articles of incorporation provided for the farming, grazing, and cultivation of land, etc. so the purposes of the corporation show that it was incorporated for the sole purpose of taking over these lands in question.

36 Statute Laws, page 1098, Sec. 37, page 150 of Federal Statutes Annotated, 1912 supplement, provides: "If any suit commenced in the District Court or removed from a state court to a District Court of the United States, and it shall appear to the satisfaction of said District Court at any time after such suit is brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the district court or that the parties to the said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable under this chapter, said district court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed as justice may require and shall make such order as to the costs as shall be just."

This section provides that if it shall appear to the satisfaction of the district court that the parties have

been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable, the court shall proceed no further therein but shall dismiss the suit, etc.

The facts pleaded in both of these actions and the procedure pursued by Coffin, Parsons and McMillan plainly indicate that the purpose of forming the plaintiff corporation was to remove the action pending in said state court to the United States court. The Los Angeles Trust & Savings Bank, one of the defendants in the case pending in said court, being a California corporation, it would not permit that case to be removed to the United States court, and by pursuing the method pursued in this action they have accomplished that which they could not have done without the formation of this corporation.

In the case of Miller & Lux, incorporated, v. East Side Canal & Irrigation Company, 211 U. S. 293, 53 L. ed 189, which was an action brought in the United States court of the Southern District of California, the plaintiff was a corporation of Nevada, and the defendant a corporation of California, and the case was brought into the Court by certificate under act of Congress of March 3, 1891, relating to the jurisdiction of the Circuit Court as affected by the above section relating to actions being removed from state courts to the Circuit Court, etc., and in that case the answer of the defendant stated that he plainiff was a Nevada corporation, but the California corporation of Miller & Lux was the owner of the capital stock and the Nevada corporation had no existence except

as the mere agent of Miller & Lux, the California corporation; that the property was held by the plaintiff as such agent. The Court held that the section of the statute above cited required the dismissal of the action.

As to the SECOND SPECIFICATION of error, to-wit: that the Court was in error in declaring the declaration of trust (Exhibit "A" Tr. 19) attached to defendant's answer to be a trust deed, will say, the declaration of trust provides:

"WHEREAS, heretofore, to-wit: on or about the 25th day of February, 1913, there was conveyed to the Los Angeles Trust & Savings Bank, a corporation, the following real property, situated in the County of Fresno, State of California, described as follows:" (Tr. 19)

"WHEREAS, the said conveyance to the Los Angeles Trust & Savings Bank is absolute in form and purports to convey to said bank the absolute, legal and equitable title to all of said property, subject to the easements and rights of way hereinbefore mentioned, nevertheless the said deed and grant are intended to convey the said property to said bank for the benefit of those certain persons hereinafter named and designated as beneficiaries and whose respective interests are hereinafter set up;" (Tr. 23)

F. F. Doane, appellant herein, is designated in the instrument as the beneficiary. (Tr. 26, 5th paragraph).

It will be seen from the foregoing that the bank did not in fact hold the property absolutely, nor did

it hold the legal or equitable title to the property, it only purported to do so. The title to the property was held for the benefit of Doane, the beneficiary, and whose interest was set up in the instrument.

Quoting again from page 23 of the transcript:

“WHEREAS, said Los Angeles Trust & Savings Bank paid no consideration for said property, and has no interest therein, except as hereinafter stated.”

It is thus made to appear that the Bank had no interest in the property and paid nothing for the property, and was in fact a mere naked agent.

The instrument then proceeds to declare and certify that the Bank holds and shall hold all the interest acquired in said real property under and by virtue of said conveyance (the deed dated February 25, 1913) upon certain terms and conditions.

Eliminating from the declaration the portions that are not necessary to ascertain the construction of the instrument concerning the questions involved, it provides:

1st. To SECURE to H. N. Coffin, et al., payees, the sum of \$379,000.00 with interest;

2nd. That after said property is released to F. F. Doane in accordance with the terms of the declaration, to sell the same as instructed by said F. F. Doane, in accordance with maps, etc., it being understood that the Bank shall issue and execute all contracts of sale and deeds for any part of said property, that said contracts of sale shall prescribe, etc.

3rd. The Bank shall not be called upon to make any improvements on said property, but the im-

provements thereon shall be paid for by F. F. Doane who promises and agrees to hold the said Bank free from liens, claims, demands, charges and expenses by reason of any improvement or improvements made or contracted to be made by them.

4th. The Bank shall receive all moneys received from the sale of said property, and shall distribute the same as follows:

1st. To the payment to itself of one-tenth of one per cent of the actual sale price for drawing and executing the Declaration; \$2.00 for each contract, deed or other instrument in writing executed by the Bank, and one per cent of all moneys coming into its possession under the terms of the Declaration, together with necessary expense incurred in the administration of the trust, including cost of certificates of title, and reasonable compensation of all extraordinary services rendered; provided, that the payees (McMillan et al.) nor their interest or the interest of any person whom they represent in said land shall be liable for any expense, costs or fees of the Bank. Nor shall the Bank be entitled to any **lien** upon said land superior to the **lien** of said payees (McMillan, et al.) for the balance of the purchase price and interest thereon. (Vendor's lien). But in case F. F. Doane should make default in the payments upon his part to be made, and the Bank under the terms of the declaration should **proceed to foreclose** said F. F. Doane in the manner herein provided for (which manner is contrary to law) then and in that event, said payees agree to pay said Bank in full

payment for such services of **foreclosure and sale**, the sum of not to exceed \$1,000. etc.

2nd. To the payment of taxes on the property, etc;

3rd. To the payment to the payees the sum of \$379,000, with interest, etc;

4th. The balance of the moneys remaining on hand shall be held subject to the order of F. F. Doane.

(Thus indicating and recognizing the fact by the parties that Doane was the real owner of the property in fact, and that any surplus money derived from the sale should be paid to Doane.)

5th. The parties to the trust are Coffin, et al. to be known as payees, and Doane to be known as the beneficiary.

6th. In case Doane failed to pay the Bank sufficient money in accordance with the terms of the instrument to enable the Bank to meet the payments due the payees, McMillan, et al. under this trust, at the times and in the amounts set forth, then on demand of said payees, and without demand by the Bank for the payment of any sums, the Bank shall sell the granted property or such parts as it shall deem necessary to accomplish the objects of the instrument, to which demand or election to declare the whole amount due, Doane agreed. The instrument then declares that the sale shall be made by the Bank by publishing notice of the time and place of sale, which notice shall be published at least once a week for four successive weeks in a newspaper in

Los Angeles County, California, and upon such sale said Bank shall execute and deliver to the purchaser a deed to the property without any covenants, and from the proceeds shall pay:

1st. The expenses of such sale, the compensation to the Bank;

2nd. To the payees, McMillan et al., the amount unpaid on the said purchase price, with accrued interest;

3rd. The balance of such proceeds to the order of F. F. Doane.

(Thus again recognizing Doane as the owner of the property and the real party holding the title.)

Then follows an agreement that the Bank may lay down rules of evidence absolving it from liability for any act it may do and cure any defect or omission on its part by recitals in its deed. Thus giving them power to create rules of evidence for courts affecting property rights.

7th. The instrument then provides that any of the lands in half sections, etc., may be released to F. F. Doane from any **lien** of the the purchase price due to the payees under the instrument, upon the payees, McMillan, et al., receiving \$10,000 for each half section so released, etc.

(It will be noted that the land is not to be conveyed to Doane but a release of **the lien** upon the land is given Doane.

8th. It then provides that the personal property shall be turned over to the possession of the beneficiary, Doane, at the time Doane takes possession of

the property, and upon payment of the purchase price of the property which shall be made by Doane, then in that event the title to the personal property shall vest in Doane (conditional sale of personal property). But in the event of default of payment of the purchase price, and sale by the bank under said default, the personal property shall be subject to the same terms of sale as the real property, and in fact shall go with the real property when deeded.

9th. Provision is made that the payees McMillian et al., and beneficiary, Doane, shall indemnify the Bank from any of the liabilities, claims, etc., which it might suffer or sustain by reason of the acceptance of this trust or its possession as trustee, and the beneficiary Doane shall appear in and defend any suits brought with reference to said property or growing out of the trust.

(Thus again absolutely absolving the bank from being a party in any way to the transaction other than a mere naked agent of the parties without any responsibility or accountability to the parties whatever.

10th. This subdivision provides that the Bank shall be paid for any extraordinary services rendered in the execution of the trust by the beneficiary Doane, in addition to the compensation hereinbefore provided, and that it shall have a **lien** on all of the trust property to secure the same, subject to the **lien** of the payees, McMillan, et al., and the trust shall not cease or terminate in any event until the Bank shall have been fully paid.

11th. It is provided in this subdivision that the Bank makes no representation of facts as to the title, but that it shall be the duty of the beneficiary Doane to pay all taxes, assessments, mortgages, liens or encumbrances now on said property or that may hereafter be assessed or levied thereon by any taxing power or governmental authority, and all **mortgages, liens or** other incumbrances hereafter placed thereon **by the beneficiary Doane** or by any other person at his request.

(Thus it appears that Doane was considered as the owner of the property and that he had the right to put subsequent mortgages, liens or other encumbrances upon this property.)

Thus it will be seen that wherever the interests of the payees are mentioned or attempted to be defined or designated the word "lien" is used, and expressly declaring that the payees, McMillan, et al., hold this lien as security for the indebtedness due them. The Bank is clothed by the instrument with simply the powers of an agent and without any title in fact to this property and with no interest therein. It is thus apparent that the Bank considers that it does not hold the title in the true sense of a trustee as contemplated in trust deeds, or by statute. The instrument itself negatives the idea that the Bank holds title by virtue of the deed dated February 25, 1913. It states that while the deed purports to convey the absolute legal and equitable title, it was only intended to convey the property to the Bank for the benefit of Doane and as security for the payment of the

\$379,000 due McMillan, et al., and that the Bank has no interest in the property and paid no consideration for it.

Doane is treated throughout the instrument as the owner of the property, entitled to its possession, and with the right to sell the same and to create liens and mortgages upon it.

The instrument treats McMillan, et al as lienholders, and Doane as the debtor obligated to pay the debt, and that the Bank received the deed absolute in form only to secure the payment of the debt.

“In this State a mortgage is not treated as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. It is a mere security for a debt, and default in the payment does not change its character. Neither can possession under the mortgage affect the nature of the mortgagee’s interest, though by the language of the decisions it would seem otherwise. It can neither abridge or enlarge that interest or convert what was previously a security into a seizin of the freehold. If the mortgage confers no right of possession, entry under it can give none. It does not change the relation of creditor and debtor, or impair the estate of the mortgagor, but leaves the parties exactly as they stood previous to such possession. In this State the owner of a mortgage cannot become the owner of the mortgaged premises, except by purchase upon sale under judicial decree, consummated by conveyance.” *Nagle vs. Macy*, 9 Cal. 428.

“In truth, the original character of mortgages has

undergone a change. They have ceased to be a conveyance, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its payment furnished on the other. They pass no estate in the land, but are mere securities, and default in the payment of the money secured does not change their character."

"Proceedings for the foreclosure of mortgages, in the sense in which the terms are used in England, and in several of the States, by which the mortgagor, after default, is called upon to repay the loan by a specied day, or be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this State can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance. A foreclosure suit, by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises, for its satisfaction, the surplus, if any, going to subsequent incumbrancers or the owner of the premises, and execution following for any deficiency. *Mc-Millan vs. Richards*, 9 Cal. 365-412.

In the case at bar the terms are used, page 26 of the transcript, "in full payment for such foreclosure and sale," and also "should proceed to foreclose said Doane."

It will also be noted that the indebtedness is to be paid by Doane who is the real owner and considered

as such by the terms of the instrument. Doane is to pay the taxes, has the right of possession of the property, and the instrument contemplated that upon failure of Doane to make the payment of the indebtedness secured that he shall be foreclosed from the payee's lien upon the property.

It will be noted as hereinbefore indicated that the deed conveying the property to the Bank was made a year and six months prior to this declaration. In other words there was no agreement in writing between the parties as to the terms or conditions under which the deed was given to the Bank, and the Bank therefore held the title as a resulting trust, and also in the capacity of holding it as security for the payment of the \$379,000 as mentioned in the former contract of purchase mentioned in the stipulation of facts (Tr. 48).

The Supreme Court of California in *Campbell vs. Freeman*, 99 Cal. 547, says:

“The rule is familiar that when, upon a purchase of real property, the purchase-money is paid by one person and the conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase-money is paid. The real purchaser of the property is considered as the owner, with the right to control the title in the hands of the grantee and to demand a conveyance from him at any time. The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is

made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser; he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security; and he may also enforce his lien by an action of foreclosure. The conveyance is none the less a mortgage because it was conveyed to him directly by a third party, to secure his loan to the purchaser for the amount of the purchase money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him as a security for the money that he had previously borrowed, with which to make the purchase. He is regarded as holding the land in trust for the protection of the purchaser, but this rule is not to be so extended as to enable the purchaser to work him an injury. Equity looks beyond the form of a transaction and shapes its judgments in such a way as to carry out the purposes of the parties to the agreement, and to protect each of them against any unconscionable advantage to be derived from the apparent form in which their transaction has taken place. In the present case the title to the land which the plaintiff took from the grantor

was held by him in trust for Anderson. This was a trust created by operation of law," (as in the case at bar, prior to the execution of Exhibit "A" the Bank held the title for Doane and created a trust between Doane and the Bank by operation of law and not by agreement) "but contemporaneously with the creation of this trust there was impressed upon the title, by virtue of the agreement between Anderson and the plaintiff, a lien in favor of the plaintiff for the money which he had loaned him with which to make the purchase, and also for such other moneys as he should afterwards loan or advance to him. It was competent for them to make such an agreement, and the agreement, when made, had the effect to render the conveyance to the plaintiff a mortgage to secure the loans advanced to Anderson. "Any interest in property which is capable of being transferred may be mortgaged" (Civ. Code, Sec. 2947), and if the transfer is made as security for the performance of an obligation, it is, in equity, a mortgage, irrespective of the form in which it is made. A deed, absolute in form, may be given as a security for future advances, without any accompanying obligation in writing on the part of the person giving the deed."

It will thus be seen from the foregoing that the Los Angeles Trust & Savings Bank hold this property in trust for Doane, and that as between Doane and McMillan et al., it was held as security, and that such transaction constitutes a mortgage in equity and creates a lien in favor of McMillan, et al.

Section 726 of the Code of Civil Procedure of

California, provides:

"There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter," etc., to-wit: foreclosure.

In *Goodenow v. Ewer*, 16 Cal. 467, the court says:

"In this State, a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broke. It is regarded, as in fact it is intended by the parties, as a mere security, operating upon the property as a lien or incumbrance only. Here the equitable doctrine is carried to its legitimate result. Between the view thus taken and the common law doctrine—that the mortgage is a conveyance of a conditional estate—there is no consistent intermediate ground. In those states where the mortgage is sometimes treated as a conveyance, and at other times as a mere security, there is no uniformity of decision. The cases there exhibit a fluctuation of opinion between equitable and common law views of the subject, and a hesitation by the Courts to carry either view to its logical consequences. In *McMillan v. Richards* (9 Cal. 365) we had occasion to consider the subject at great length, and to observe upon the diversity existing in the adjudged cases. We there asserted what had previously been held in repeated instances, the equitable doctrine as the true doctrine respecting mortgages, and have ever since applied it under all circumstances, (citing *Nagle v. Macy*, 9 Cal. 426,

and other cases). When, therefore a mortgage is here executed, **the estate remains** in the mortgagor, and a mere lien or incumbrance upon the premises is created. The proceeding for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, is unknown to our system, so far, at least, as the owner of the estate is concerned."

"The fact that the title was conveyed as security gave the transaction, in equity, the additional character of a mortgage." (Windt, v. Covert, 152 Cal. 353.)

"So, even, where there is a power of sale, it has been held that if the trustee be one of the creditors secured, the transaction will be held to be a mortgage." (Banta V. Wise, 135 Cal. 280)

"Where there is a doubt whether the instrument is a deed of trust or a mortgage, the doubt should be resolved in favor of the latter construction." (Godfrey V. Monroe, 101 Cal. 227).

If the transaction be a mortgage, all the qualities and incidents of a mortgage attach, whatever be its external form, and whatever be the collateral stipulations. The Maxim, Once a mortgage, always a mortgage, applies to this condition of fact with especial emphasis. The rights of the two parties are reciprocal; that of the grantor to redeem after a default in payment at the specified time is complete; that of the grantee to foreclose and cut off this equity of redemption is no less clear.

"A general criterion, however, has been estab-

lished by an overwhelming consensus of authorities, which furnishes a sufficient test in the great majority of cases; and whenever the application of this test still leaves a doubt, the American courts, from obvious motives of policy have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments." Pomteroy's Equity Jurisprudence, 2nd Ed. Sec. 1194-1195.

Section 744 of the Code of Civil Procedure of California provides: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

In the case at bar the original transaction was

commenced in the contract for the purchase of the property and culminated in the deed to the Los Angeles Trust & Savings Bank, and remained in that condition for one and a half years without any agreement as to the condition under which the title was held. They therefore, without doubt, during that time, considered it a mortgage as security for the payment of this debt without any power of sale, and the only remedy under our court and method of procedure was under section 726 of the Code of Civil Procedure, to-wit: that only one action can be brought to recover any debt or enforce any right secured by a mortgage.

In the case above quoted of Godfrey V. Monroe, 101 Cal. at page 227, the Court says:

“The deed from Hall to the Los Angeles Improvement Company, and the agreement accompanying the same, constituted a mortgage with the power of sale—the transaction was consummated by a deed with a separate defeasance authorizing the improvement company to sell so much of the land as might be necessary to pay the amount of the loan, interest, and charges, and to convey to Ellis the property remaining unsold. This form of security is no longer looked upon with disfavor, and our statutes expressly authorize mortgages conveying the power of sale upon the mortgagee or other person (Civil Code, sec. 2932.) The power given is merely a cumulative remedy, and does not in any way effect the right to foreclosure in chancery. (*Cormerais v. Genella*, 22

Cal. 116). If there was any doubt as to whether an instrument was intended as a mortgage or a deed of trust, such doubt should be resolved in favor of a mortgage with the power of sale. The intervention of a trustee is not always, but is generally, a serious inconvenience and expense. "The mortgagor is apt to suppose that in placing the exercise of the power in the hands of a disinterested third party, whose position in relation to it is merely that of a trustee, he secures for himself the protection of fair dealing. It generally happens, however, that the debtor has to pay for the services of a trustee, whose disinterestedness is no more than that of the creditor himself."

Another peculiar condition of this declaration is this:: that the absolute title under the express conditions of the declaration did not pass to the Los Angeles Trust & Savings Bank. The declaration uses language as follows:: Whereas said conveyance to the Los Angeles Trust & Savings Bank is absolute in form and purports to convey to said Bank the absolute legal and equitable title to all of said property to said Bank for the benefit of those certain persons hereinafter named and designated as beneficiaries and whose respective interests are hereinafter set up." The beneficiary named in the instrument is Doane. The next paragraph says: "Whereas said Los Angeles Trust & Savings Bank paid no consideration for said property and has no interest therein except as hereinafter stated." The trust

company declares that it holds all the interest acquired in the said property under and by virtue of said conveyance in trust upon the following terms and conditions, to-wit: to secure the lien, etc. In other words, the declaration itself declares that the deed, absolute, in form, did not in fact convey the absolute title, that the Los Angeles Trust & Savings Bank paid no consideration for the property, and had no interest in the property other than to hold it as security for the payment of the debt.

The court in *Anglo-California Bank v. Cerf*, 147 Cal. 388 says:

“The fact that the defendant Stienhart, a manager of plaintiff corporation, was named as grantee in the deeds instead of the plaintiff itself, in no degree impairs their validity as mortgages in favor of plaintiff. If authority is needed upon this proposition it is to be found in *Banta v. Wise*, 135 Cal. 277, where the question was squarely presented in the case of a deed absolute on its face purporting to grant certain realty to one who was a member of a partnership. The deed was enforced as a mortgage in favor of the firm, it being shown that it was given as security for an indebtedness due the firm and to secure contemplated advancements by the firm. It was pointed out in the opinion that the general equitable principle applicable in this class of cases applies equally to all cases of deeds made to secure money, whether due or to become due, “or whether due to the grantee or another.” It was said therein,

speaking of a deed made to one as security for the debt of another: "such a transaction comes equally within the definition given in the Code, which is, that a mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession' (Civ. Code, sec. 2920), and also within the provision that "Every transfer of an interest in property, other than in trust, made only as a security for another act, is to be deemed a mortgage etc (Civ. Code, sec. 2924). The exception made in the section last cited refers only to the express trusts provided for by other provisions of the code (secs. 852, 857) which, though in some cases difficult in principle to be distinguished, are held not to be mortgages..... But these decisions apply only to cases where, by the terms of the deed, the trustee is authorized to sell and to apply the proceeds in payment of the debt, and not to deeds where there is no power of sale expressed."

It will be noted that when the deed was given to secure this debt there was no provision of a power of sale but that in the declaration of trust such power was given, and this power of sale was revoked by Doane prior to default as hereinafter discussed.

"Admittedly, the deeds were given solely by way of security and were in fact only mortgages. Being such, they carried no estate in the land, but were mere securities, creating only a lien on the land,

which was an incident of the secured debt (*Savings and Loan Society v. McKoon*, 120 Cal. 177). If the giving of a mortgage on realty to one person as security for a debt due another creates a trust, it is not a trust in relation to real property within the meaning of the provisions of our code relating to trusts." *Id* 389.

It will be noticed from the foregoing that the deed given in February 1913 without any writing as to the conditions of the trust was nothing more at that time, than a resulting trust which under the decisions make it merely a mortgage to secure a debt. The declaration of trust as to the conditions under which the mortgage was held add nothing more to it, and it still remains a resulting trust. It does not convey the title absolutely to the Bank. In fact the declaration negatives such an idea. The equitable title under the declaration of trust is in Doane, for it says that Doane is the beneficiary and upon payment of \$55,000, which was paid, he had possession and right of possession, and Doane was to pay the taxes, expenses connected with the land and have the surplus money in case of a sale, showing that all parties considered Doane as the owner of the property in fact.

REVOCATION OF POWER OF SALE

A year and a half after this deed was given to the Los Angeles Trust & Savings Bank for the benefit of Doane, a power was given by the parties to the Bank that upon default of payment of the indebted-

ness, that the Bank could sell the property and pay the indebtedness due the payees, McMillan et al, the balance to be paid to Doane after paying expenses of sale, etc. This power is in addition to the original agreement or resulting trust and is nothing more or less than a power of attorney or creating the Bank an agent for the parties to sell the property in case of default. This additional power or agreement is void as against Doane, the owner of the property, for it cuts him out of his right of redemption if the Bank has the right to convey title to others. If this is a mortgage which courts seem to clearly decide that it is, then the power of attorney or power given the Bank to sell as stated in the declaration of trust is void under section 2889 of the Civil Code of California which is as follows: "All contracts for forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."

Section 2903 of the same code says: "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he was bound to make such redemption for their benefit."

In *Bradbury v. Davenport*, 114 Cal. 594, the court

says: "Under section 2889 of the Civil Code, and also aside from its provisions, a mortgagor is not allowed to renounce beforehand his privilege of redemption, nor can he by any form of words make a valid executory contract to preclude himself from redeeming."

Quoting further on page 599, the court says: "It is well settled that the mortgagor is not allowed to renounce beforehand his privilege of redemption; that while generally any one may renounce any privilege or surrender any right he had, that an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions in order to raise money.....And he cannot agree that upon default his mortgage shall become an absolute conveyance."

"The burden is upon the creditor to show that the right of redemption was given up deliberately and for an adequate consideration. Generally, when the consideration of the conveyance was an existing debt, a provision that, if the amount required for a repurchase be not paid at the time specified, the agreement for repurchase shall be null and void, or that there shall be no redemption afterwards, is looked upon as a device to deprive the debtor of his right of redemption, and is therefore disregarded."

Jones on Mortgages, Sec. 251

The property being the property of Doane and given as security, Doane having given a power of

sale to the Bank subsequent to the execution of the mortgage, it was a collateral and subsequent agreement giving a power of attorney without any consideration moving to Doane, and if enforced would deprive him of a right which the statute would give him, to-wit: that of possession for one year and the right to redeem within that period.

The question then arises had Doane the power or right to revoke this power of attorney or agency prior to the indebtedness becoming due. It will be noted that the revocation (Tr. 110-115) was given by Doane prior to March 1, 1915 when the sum of \$93,000 became due.

In the first place the courts have construed that this power when coupled with a mortgage is in addition to the mortgage itself. In other words the courts treat it as a separate instrument although embodied in the same instrument.

Fogarty v. Sawyer, 17 Cal. 593

The powers of sale of trust deeds or mortgages are strictly construed. Savings & Loan Society, v. Burnett, 106 C. 1. 534.

Doane had the right to revoke this power of sale for many reasons; first, it was not a part of the original transaction; second, there was no consideration paid for it; third, it was not contemplated by the parties when the deed of February 25, 1913, was executed; fourth, that it is contrary to the statute of the State of California, to-wit: section 2889, Civil Code.

Agency may be terminated by revocation by the

principal unless the agent has an interest in the subject of the agency. Civil Code 2356. In the case of *Brown v. Pforr*, 38 Cal. 552, which was a case where a broker entered into a contract with the owner, whereby he was to be paid a certain sum if he found a purchaser within a specified time, and the lower court held that the owner could not revoke the contract until the time had elapsed without the consent of the broker. The case was appealed, and reversed, the Supreme Court said: "It seems obvious to us that the restriction was intended for the benefit of the defendant (the owner), and not the plaintiffs..... There is nothing directly or impliedly affecting the question of revocation; and, indeed, we are unable to perceive how, under any circumstances, a mere limit as to the time allowed for the performance of a contract of agency to sell land, can be construed into an agreement on the part of the principal not to revoke the power. The rule that in this class of contracts the principal may revoke at any time before complete performance by the broker, unless he has expressly otherwise agreed, may be a harsh rule, as suggested by counsel; but if it is, it would seem to be a very easy matter for the broker to protect himself against it. At all events, if he does not insert a covenant to that effect in his contract, the Courts cannot do it for him."

Thus in the case at bar, Doane having given the power of attorney to the Bank to sell the property under certain circumstances, he had the power to re-

voke it at any time before it was completed.

A power of attorney may be revoked by the principal notwithstanding it is in terms irrevocable unless, it is coupled with an interest in the agent, or is supported by a consideration, and the mere use of the word "irrevocable" in the power when not thus coupled or supported, confers no greater power on the attorney than an ordinary power of attorney.

Frink v. Roe, 70 Cal. 296.

The question here then is, did the Bank have such an interest in this property which would prevent the power from being revoked. The Bank has a right to commissions for its services and for certain fees therein named, but the instrument itself declares that the Bank has in fact no interest in the property, nor has it any title to the property either legal or equitable, that it paid no consideration for the property, and therefore has no interest therein.

In the Case of Flanagan v. Brown, 70 Cal. 258, the court in commenting on section 2356 of the Civil Code, says: This language is not as broad as that found in some of the text-books which define the extent of the principal's right of revocation of the agent's authority. It does not include, as do many of the books, an agency given for a valuable consideration as one whose power is irrevocable. It makes use of language frequently found and construed in the text-books, and omits a portion of the limitations set on revocability. It seems to limit the principal's power of revocation to cases when his

agent is vested by his principal with an interest in the property itself which is the subject of the agency. The term 'power coupled with an interest' is well understood, and is discussed and defined in the very cases cited by the code commissioners under the section above referred to. These cases lay down the rule that a power coupled with an interest is where the grantee has an interest in the estate as well as in the exercise of the power. It is determined to exist or not accordingly as the agent is found to have such estate or not before the execution of the power. If his interest is only a right to share the proceeds which result from the execution of his power, the agent has not a power coupled with interest."

"The case of *Brown v. Pforr*, 38 Cal. 550, recognizes the rule as to power coupled with an interest."

"There the agents had an interest to the extent of \$750 in the execution of the power conferred within the time named in their contract of agency, but they had no interest in the real estate which was the subject of the agency. Accordingly, the principal, even within the time limited in the contract, was held to be at liberty to revoke."

"The case of *Hartley and Minor's Appeal*, 53 Pa. St. 212, is instructive in this connection."

"There was an ordinary agency, established by letter of attorney, to collect moneys that might be due the principal from the estate of her father. For their services the attorneys were to have one half of the net proceeds of what they might recover for her.

The court there says: "The plaintiffs in error claimed that this clause (giving one half of the amount recovered) rendered the power irrevocable by the principal under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power an interest in the thing or estate to be disposed of or managed under the power. In the case in hand, the power and the interest could not co-exist. The interest the appellants would have would be in the net proceeds collected under the power and the exercise of the power to collect the proceeds would be ipso facto to extinguish it entirely, or so far as exercised. Hence the appellant's interest would properly begin when the power ended." The power was therefore held revocable."

"Flanagan, in the sense of the rule here laid down, and of the rule laid down by section 2356 of the code, was not the holder of a power coupled with an interest. If not, by the terms of that section his power is revocable, and his principal's release is a good bar to this action."

It will thus be noted that Doane a year and a half after the execution of the deed to the Bank, executed this power of attorney authorizing sale in case of default without a consideration moving to him. The instrument did not change the original relations of

the parties as it existed prior to the execution of the declaration of trust as to the legal responsibility of one to the other. This additional power of sale was given by the real and recognized owner of the land, to-wit: Doane, and it was from him that this power of sale must come. It could not come from the payees, nor was the original loan given in consideration for this power of sale. Doane then was the only one that could give this power of attorney and he had the right to revoke it.

The powers conveyed to the Bank by the declaration of trust had not been exercised by the Bank at the time of the revocation, nor had any rights been affected or any powers exercised under the power of attorney between the time of its execution and the time of its revocation by any of the parties to the instrument or herein concerned, it having been revoked prior to any default by Doane, and also prior to sale of the property by the Bank as set forth in plaintiff's exhibit "C" (Tr. 68).

The power given to sell and thereby cut off the right of redemption, being contrary to the spirit and intent of the law is and should be revocable.

The right of redemption having been granted by the statutes, and as given by nearly all the states of the Union, was for the protection of the debtor, and it should not be lightly treated. Nor should the courts undertake to enact a law in direct conflict with the express provisions of the statute. Such decisions and such rulings are what leads to a great deal of

public criticism of the courts. No one reading section 2889 can be misled as to the spirit and intent of that section. The reason for it is obvious. It is for the protection of the debtor. The creditor at the time of the loan is at perfect liberty to either accept the loan or reject it. He has no obligation to meet and has no burden to bear, nor any risk to run other than that the security is ample. While on the other hand the debtor when seeking the loan is always, and generally, experiencing a time of depression financially and in need of money in order to protect himself from loss and is placed in a position that he must exert every effort possible to induce the creditor to grant the loan, and is not in a position to exercise his best judgment and is liable to do things he would not do had he the privilege of exercising his best judgment or was not forced to do so by the creditor.

The section above referred to was to prevent forfeiture of property such as was contemplated in this case at the time of giving this power of sale. It is undue advantage to the debtor to not give him that which the law gives him, to-wit: one year in which to redeem. The right of redemption is a wise law created for the protection of the weak against the strong, and courts should not give their aid and assistance in recognizing such contracts of forfeiture. Courts repeatedly said and are repeatedly holding that they abhor forfeitures and scrutinize them closely.

“Provisions for forfeiture of vested rights, whether in statutes or contracts, are not favored, and are, as

they ought to be, construed as strictly or as liberally as possible against the forfeiture." (People v. Perry, 79 Cal. 112.

"Every intentment and presumption is against the person seeking to enforce the penalty or forfeiture provided by such a statute." (Savings and Loan Society v. McKoon, 120 Cal. 179).

"Burden of proving facts constituting foreclosure rests on the party asserting it." (Callahan v. James, 141 Cal. 294.)

Section 2889 Civil Code providing that all contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured, and all contracts in restraint of the right of redemption from a lien are void, has been passed upon by our Supreme Court in several cases in which they determine that at the time of the execution of an instrument or obligation they have not the right to make a contract whereby they waive or relinquish their right of redemption, but that they have the right thereafter to contract or sell their right of redemption provided it is fair and free from undue influence or oppression or fraud, and for an adequate price.

Phelan v. DeMartin, 85 Cal. 365. Watson v. Edwards, 105 Cal. 76. Bradbury v. Davenport, 114 Cal. 598. Davenport v. Bradbury, 120 Cal. 152. Garwood v. Wheaton, 128 Cal. 406.

It will be noticed in the case at bar that Doane at no time has contracted away his right of redemption nor has he waived it, but on the contrary has insisted

upon his right of redemption from the beginning in claiming that the transaction whereby the title was conveyed to the Los Angeles Trust & Savings Bank constituted a mortgage as to him and that he had the right to redeem. While on the other hand, the Bank took the opposite view as is shown by their conveyances and actions subsequent to the time of default. They were notified by Doane that he revoked their power of sale, that he claimed they held the title of the property as security for this loan, and that Exhibit "A" constituted a mortgage in fact, and that the declaration in legal effect was a mortgage coupled with a power of sale. Under the decisions as hereinbefore referred to, when included in the mortgage is a contract in addition to the mortgage although it may be in one instrument. The Bank acting as trustee herein have by its own acts attempted to declare and determine the rights of the parties thereto without any adjudication of the courts and has sought to enforce as against Doane the forfeiture of his rights here in dispute. Thus placing a power with the trustee to pass upon the disputes of the parties to the instrument against the protest of one of the parties.

The declaration of trust is not in the form of an ordinary trust deed, for in an ordinary trust deed the legal title is granted to the trustee absolutely. In the declaration of trust here it is not conveyed to the trustee absolutely for the declaration itself recites that the Bank only received a title in form and that it does not hold either the legal or equitable title and

has no interest in the property. All of which statements are express provisions of the instrument and should be most strongly interpreted against a forfeiture. By the actions of the trustee herein in selling the property and giving a deed back to McMillan, et al., Doane is deprived of his rights to have ascertained the amount due from him, also his right to have determined the amount necessary to redeem, and also he has been compelled to forfeit all his rights to the property, without a judicial hearing and the Appellee herein is by this action seeking to foreclose and bar the appellant from any claim to this property either as owner-redemptor or otherwise and it is the claim of appellant that his interest in this property should be defined by this action.

In the case of *Hall v. Arnott*, 80 Cal. 352, it is decided that where a deed, absolute in form, was given to secure an existing indebtedness of the grantor, that such a deed did not pass the legal title but merely operated as a mortgage between them. And it was further held that the defeasance executed four months afterwards reciting that the legal titles conveyed by both deeds would be reconveyed upon payment of the indebtedness secured by both deeds therein mentioned, did not change the effect of the deed of August 7, 1882, in view of the purpose for which the said deed was given. Quoting from that part of the decision, it reads as follows: "The fact of an existing indebtedness between the parties thereto, at the time of the execution of the deed, and the object for which it was executed, and the con-

tinuation of the relation of debtor and creditor having been admitted, the court properly found that the deed was not intended as a trust deed conveying the legal title to the property, but merely a security for the payment by Waterhouse of the indebtedness existing at the time it was executed, and afterwards incurred by him, in accordance with the terms of the defeasance of December 20, 1882, executed and delivered by Arnott to Waterhouse. A mortgagee is not entitled to the possession of the mortgaged property, unless expressly provided for by the terms of the mortgage. The deed in controversy being a mortgage, which did not pass the legal title, did not give the right of possession ;”

As to the THIRD SPECIFICATION OF ERROR, that the court erred in declaring that Doane had no interest in the property as set forth in the decree or judgment therein ; if the transaction here be declared a mortgage, that Doane was mortgagor and Mc-Millan, et al, were mortgagees, and that the right of redemption still exists, then Doane has an interest in this property and his title has not been forfeited by the procedure herein prosecuted by the trustee and the payees. Assuming that I am correct in this, the court was in error in finding that Doane had no interest in the property. The California Land Company, appellee herein, in their bill in equity pray that Doane may be required to answer and set forth the grounds and nature of his claim and pretention and that this court may determine each of them and that it may be adjudged that they are unfounded in law

and equity, and that the complainant is the owner of the premises and entitled to their possession. (Tr. 5)

It will thus be seen that appellee is asking the appellant to come into court and set forth his claim. This the appellant has done (Tr. 12), and the trial proceeded to determine the questions involved.

Anticipating the defense of appellant's position in this case relative to the necessity of the appellant to make a tender of the amount due the payees before he is entitled to rights in this court of equity, I will call the court's attention to the nature of appellee's action. The appellee in its bill in equity herein prays that the defendant may be required to answer and set forth the grounds and nature of his claim and pretensions, and that this court may determine each of them, and that it be adjudged they are unfounded in law and equity, and that plaintiff is the owner of the premises and entitled to possession, etc. It will be noted that the appellant is invited into court to set up his claim or rights to this property. If the appellant's contention is correct, that the instrument involved herein is in fact a mortgage, then clearly under the laws of this state Doane has a right and interest in the property, and he has a year in which to redeem before he can be foreclosed of those rights. His rights can only be foreclosed by suit brought to foreclose appellant's interest in the property and foreclose his right of redemption, etc., in the usual form as required by section 726 of the Code of Civil Procedure of California.

This is the position and contention of the appel-

lant, to-wit: that the plaintiff should have foreclosed his mortgage and procured a judicial sale of the property, and that appellant would thereby have the right of redemption. If the appellee's contention is correct, then in case of a mortgage foreclosure, the mortgagee could bring a suit after a judicial sale, to quiet title to the property and deprive the mortgagor of his right of redemption within a less period than a year unless the mortgagor made his tender or offer of payment before he could make such a defense. Such contention would deprive the mortgagor of any right of redemption. The appellant having been invited into court to set up his claims has done so, and if appellant's contention is correct, that the deed is a mortgage and that he is in fact the owner of the property, and that the property was conveyed to the Los Angeles Trust & Savings Bank for appellant's benefit, and that he is entitled to the possession of the property until foreclosure, then he has such an interest in the property that it would not be necessary at this time to make a tender in order to establish his rights and title in this property. If the appellant had brought an action to redeem and sought to enforce redemption by claiming that the instrument was a mortgage as against appellee, then the contention of the appellee might be correct, but the case at bar is a very different matter. A court of equity should protect appellen't interest in this property and ascertain it as prayed for by appellant. The appellee should not take the position that if appellee is correct in its construction of the istrument, that

he can invite appellant into court and then say that he should not have the right to redemption unless he tenders the amount due. It seems to be illogical and would lead to unjust and unfair results.

Suppose that appellant had given a mortgage in the ordinary form, and the appellee had foreclosed the mortgage by judicial process and had the property sold under judicial sale, and immediately after such sale brought suit to quiet title against appellant requesting him to come into court and set up his claims to the property, and that his claims be adjudged as unfounded. If appellee's contention is correct, in less than six month's time, if appellant did not tender or offer to redeem he would be cut off from his right of redemption. Such is not the intent or purpose of the law. The right of redemption is given to every person. It is a wise law, given to protect the weak against the strong. The creditor can always protect himself but the debtor is often thrown in hazardous condition financially and he is not able to protect himself within a short time, while, if given a reasonable length of time he could do so. And often the security is worth many times the amount of the indebtedness, and the creditor is always amply protected.

In commenting on the cases cited by the lower court, (Tr. 50), will say that the case of *Hughes v. Davis*, 40 Cal. 117, was an action brought to recover possession of property where a deed and lease were executed to secure the payment of an indebtedness. Case of *Pico v. Galliardo*, 52 Cal. 206 was a suit in

ejectment, as was also the case of *Montgomery v. Specht*, 55 Cal. 358. In the case of *Whitmore v. San Francisco Savings Union*, 50 Cal. 150, which was a case relative to presentment of claims against an estate and also involved the statute of limitations, with a dissenting opinion by Judge Crocket. The Court in its decision makes the following comment: "The Court would doubtless compel the surrender of the securities upon the payment of the debt, or it would upon the application of the debtor, direct a sale of the securities, and that the overplus, if any, arising from such sale after the payment of the debt, be paid over to the debtor. This would be to do equity. The case last mentioned, quoied by the lower court in his opinion, was undoubtedly correct in thus asserting that the creditor should not be compelled to give up his securities without a payment of the debt. But that is not the question here before the court. The question before the court in this case is as to the title or interests of the respective parties to this action in this land in question. Actions in ejectment are actions for possessory rights and do not necessarily involve questions in title. Nor is this an action by a mortgagor to quiet title against a mortgagee. In the case at bar the appellant is brought into court by appellee, and under the general denial of title he can show that the instrument under which the appellee claims title is a mortgage, and therefore gives him no title. This has been so held in the case of *Hyde v. Mangan*, 88 Cal. 319, which was a case where the Southern Pacific Railway Company

gave a contract of sale to Mangan and wife who assigned the contract as security for the payment of a debt to Brownstone. The interest of Brownstone was finally sold to Hyde. The debt not being paid, Hyde obtained a deed from the railway company and brought this action in ejectment. The lower Court found that the assignment of the contract of sale was a mortgage of defendant's interest in the land and found in favor of the defendant. The Plaintiff appealed and claimed he was entitled to recover upon the ground: 1st, that he was the owner holder of the legal title to the premises and in an action of ejectment the legal title must control; 2nd, if the assignment of the contract were to be held to be a mortgage, the debt for which it was given being barred, defendants are entitled to no consideration without offering to redeem. The Supreme Court held that "The first proposition, that 'in an action of ejectment the legal title must control,' is not the law of this state. A mere equitable title to land, if it is of such a character as entitled the holder to possession in equity, is a sufficient defense under our system of practice to an action for the possession, brought even by the holder of the legal title."

As to the second proposition contended for by appellant, there is a line of authorities which supports such contention. (*Hughes v. Davis*, 40 Cal. 120; *Bruck v. Tucker*, 42 Cal. 352; *Pico v. Carrardo*, 52 Cal. 206). This proposition of law as laid down in the cases just cited is based upon another principal of law, established for the first time in this state in

Hughes v. Davis, 40 Cal. 120, and which has since been discarded by section 2925 of the Civil Code. This principal as announced by the court was, "that an absolute deed which is shown by parol evidence to have been intended as a mortgage conveys the legal title to the property." And our attention has not been directed to any authority since this principle ceased to be the law of this state which has held to the doctrine laid down in those cases; but upon the contrary, the later decisions of this court hold that under general issue the defendant may be allowed to show that the deed by which the plaintiff claims title is a mortgage, and therefore gives him no title."

"In the case of Healy v. O'Brien, 66 Cal. 519, the language of the decision is: "But when the court found that the deed was given only as security for money loaned, it found in effect that it was but a mortgage, and did not pass the legal title to plaintiff. If, therefore, defendants had rested only on their denial of plaintiff's alleged ownership of the property, judgment must have passed for the defendants."

"In the case of Smith v. Smith, 80 Cal. 329, the court says: "The plaintiff contends that his motion to proceed first with the trial of the affirmative defense set up by the answer should have been granted for the reason that it was an equitable defense, and that the whole judgment would have been reversed upon this ground." That affirmative defense was," that the deed of 1876 was a mortgage, and that the debt secured thereby had been fully paid." **But the**

allegation that the deed was a mortgage was merely another way of saying that the plaintiff had no title, which was fully covered by the denial of plaintiff's ownership. And so far as the plaintiff's right of possession was concerned, it was immaterial whether the **debt had been paid or not.**....And while it may be possible that if the defendant had a title he would have been entitled to some affirmative relief in the nature of the removal of a cloud, yet he did not ask for such relief in terms, and no affirmative relief of any kind was awarded to him by the judgment."

It will be seen from the foregoing case that the rule laid down by the cases cited by the court has not since the enactment of section 2925 of the Civil Code been followed.

If this deed placed with the Bank is a mortgage to secure the debt, the legal title is in Doane as the instrument itself gave him right of possession, and the title was placed in the Bank for the benefit of Doane. Doane having the right to direct as to how the title should go in case of conveyances by him, and that upon payment of the purchase money the title would become Doane's. In case of default the property was to be sold and the surplus remaining over after the expense of the sale was to be paid to Doane.

The parties all through considered and acted upon the proposition that Doane was the real owner, that the payees were lien holders and not holders of the title nor entitled to hold the title. The qualifications and limitations placed upon the holding of this deed is declared in the declaration of trust and are the

same as those imposed by law.

Could it be said in the foreclosure of a mortgage that the mortgagor before he was entitled to right of redemption would have to make a tender or offer of payment of the debt before he could acquire his right? Such a conclusion would most necessarily be reached if the contention of the appellee herein is correct.

Again he who seeks equity must do equity. Let us analyse this case from this maxim. If Doane is the legal owner or the owner in fact, and the Bank hold this property as security and the law prescribed that in case of foreclosure there can be but one action as provided by Section 726 of the Code of Civil procedure, then are the Bank, and the payees, McMillan, et al., or the California Land Company coming into court with clean hands? Are they not seeking to acquire that which the express law of the land says they shall not do in case of foreclosure of mortgages? They are bringing suit to quiet title basing their title upon an instrument which was placed with the Bank as a mortgage. They hold no better position toward Doane than the Bank did. Doane has conveyed to them none of his rights, but has protested against the manner in which appellee herein has acquired title upon which to base its action. Therefore, I say that appellee herein must do equity and must abide by the laws of the land prior to its seeking the aid of a court of equity to quiet title.

Our Supreme Court of California has said in *Bradbury v. Davenport*, 114 Cal. 603; "Nor is it true

that the debtor who has given a deed absolute in form as security for the payment of his debt must under all circumstances tender payment before he can ligitate the character of the instrument; as for example, where the debt is not due, and the grantee asserts an absolute title, or is attempting to sell and convey to a stranger. A court of equity will not tie its hands by an unbending rule which would require it to impose inequitable terms, or do any injustice, in a given case falling within a general class, though having peculiar or distinguishing features. There are sufficient facts appearing in the complaint, though not clearly stated, to show that the imposition of the condition of plaintiff's right to maintain this action, namely, that he must tender payment of the mortgage debt to the defendant, would result in a denial of justice."

The declaration of trust speaks of the interest of McMillan, et al., as that of lienholders which is contradictory of the statement that they are owners or holders of the title. The instrument recites that the title is held for Doane to be delivered to him upon the payment of the purchase price. If it were a trust deed the title would have passed and been held in the Bank absolutely without any qualifications or conditions and would have to be reconveyed by a deed of equal solemnity to the party entitled if the conditions of a trust deed had been complied with.

As conclusions from the foregoing brief, appellant herein contends:

1. That the deed of February 25, 1913, to the Los

Angeles Trust & Savings Bank was given in fact as security for an indebtedness and constituted a mortgage upon the property;

2. That Doane was entitled to the possession after payment of \$55,000.00 which was paid;

3. That the declaration of trust by reason of its own express provisions gives McMillan and their successors, the appellee herein, a **lien** upon the title;

4. That there was no consideration given for the power of sale contained in the declaration of trust for the reason that this deed and the security had been given and the indebtedness incurring a year and a half before said power was given and no consideration was given Doane for this additional power of sale.

5. That the power of sale contained in the declaration of trust was revocable by Doane and was so revoked by him;

6. That the declaration of trust did not change the effect of the deed dated February 25, 1913.;

7. That the whole transaction constituted a mortgage, and that upon default the only remedy under the statute is that provided by section 726 of the Code of Civil Procedure providing for the foreclosure of mortgages; for the following reasons:

(a) That the payees had a lien upon the title;

(b) That the parties in the declaration of trust expressly state that they hold a lien which is contradictory to the statement that they hold the title;

(c) That the absolute title was not held by the Bank according to the terms of the declaration of trust;

(d) That the Bank held the title simply as in a deed given to a mortgagee by one person as security for the payment of a debt and obligation of the trustee is only such as the law would place upon it to perform in case the declaration of trust had never been executed.

(e) The declaration of trust with the exception of the power to sell gives no additional powers than that which the law would give had the declaration not been executed.

8. That the sale by the Bank and the deed to Mc-Millan, et al., was not authorized and was without authority from Doane, the real owner of the title, and conveys no title to the property;

9. That the payees named in the declaration of trust or their successor should bring an action to foreclose and obtain a judicial decree of foreclosure and have the property sold in the manner and form provided by law, and after such sale this appellant have the right of redemption.

10. That it was not necessary for Doane to offer or make a tender in this case for the reason the action is for the purpose of determining the title to the property and not an action to redeem; and for the further reason that appellee is attempting to gain possession and title to this property in a manner not permitted by law if the transaction here be determined to constitute a mortgage.

Respectfully submitted,

G. R. FREEMAN,

Attorney for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit.

F. F. DOANE, Appellee,
VS.
CALIFORNIA LAND COMPANY, Appellant.

BRIEF OF APPELLEE

*Upon Appeal from the United States District Court
for the Southern Division, District
of California.*

Filed

OCT 11 1916

ALFRED A. FRASER, F. D. Monckton,
Solicitor for Appellee. Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

F. F. DOANE,

Appellee,

vs.

CALIFORNIA LAND COMPANY,

Appellant.

BRIEF OF APPELLEE

*Upon Appeal from the United States District Court
for the Southern Division, District
of California.*

ALFRED A. FRASER,

Solicitor for Appellee.

STATEMENT.

This is an action commenced in the District Court of United States for the Southern Division of the District of California by the California Land Company, the appellee herein, versus F. F. Doane, the appellant.

The purpose of such action was to obtain a decree of the Court quieting the title of the complainant to certain lands in California against any claim, right, title or interest of the appellant, F. F. Doane.

The Complaint filed in the trial court is in the usual form of action to quiet title, and setting forth, among other facts, the necessary diversity of citizenship of the parties and that the amount involved is sufficient to give the Court jurisdiction of the action.

The appellant, F. F. Doane, appeared in the action and filed his answer, in which he sets forth two special defenses.

First: That there was a prior action pending in the State Court of California.

Second: That the organization of the California Land Company and transfer of the property to it was collusive, fictitious and merely for the purpose of conferring jurisdiction upon the Federal Courts.

Upon the merits of the case the answer set forth in effect that the complainant corporation derived its title under an instrument designated as a Trust Deed, but which the appellant claims to be in fact a mortgage. And he asked that the Court may decree him the right of possession to the premises and such other relief as may be just and equitable.

Upon these issues the cause was tried in the District Court, and a judgment made and entered in favor of the appellee company, quieting title as prayed for in its complaint.

ARGUMENT.

Taking up first the point raised by the defendant's answer, that there was a prior action pending in the State Court. We might dispose of this question by the mere examination of the record. The appellant's

Exhibit I (Tr. p. 85) is a copy of the record in the State Court and sets forth the parties to the action in the State Court, and also sets forth the purpose of this action, and the same discloses the fact that the parties to the action in the State Court are entirely different from the parties to this action, and the relief demanded is entirely different in each action. However, conceding for the sake of argument that the parties are the same, and that the issues are the same, and that the State Court had acquired jurisdiction of the parties, yet, we maintain this would constitute no defense or bar to the prosecution of this suit.

In the case of the City of Ironton vs. Harrison Const. Co., 212 Fed. 353, the Circuit Court of Appeals case, the Court say:

"The city complains that this suit was not abated or at least stayed because of the prior suit in the State Court. Of this claim it is sufficient to say that there had been no final judgment in the State Court that the plea was therefore in effect not one of prior adjudication, but one of prior suit pending, and that a prior suit pending in the State Court will not abate the latter suit in a Federal Court even if between the same parties upon the same issues and even if the two courts are in the same district of the same state. City vs. Clark (C. C. A.), 62 Fed. 694; Bank vs. Stone, 88 Fed. 383. The request that this suit be stayed until the termination of the other case was at most an appeal to the discretion of the trial court, but it is not easy to see why the company did not have an absolute right that its case in the Federal Court should proceed to judgment. McClellan vs. Garland, 217 U. S. 268."

The facts in the case of *McClellan vs. Garland*, 217 U. S. 268, above referred to, are as follows: The Judge of the Circuit Court of the United States for the District of South Dakota made an order in an action therein pending, staying all proceedings in that Court to await a determination of another action between the same parties in a State Court. An application for mandamus was made to the Circuit Court of Appeals for the Eighth Circuit to compel the Circuit Judge to proceed and try the action notwithstanding the pendency of the action in the State Court. The Circuit Court of Appeals refused to issue the writ of mandamus, and the matter was taken by certiorari to the Supreme Court of the United States, and in the opinion of the Supreme Court in passing upon the questions say:

“The rule is well recognized that the pendency of an action in the State Court is no bar to proceedings concerning the same matter in the Federal Court having jurisdiction, for both the State and Federal Courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a State Court may also have taken jurisdiction of the same case. In the present case, so far as the record before the Circuit Court of Appeals discloses the Circuit Court of the United States had acquired jurisdiction, the issues were made up, and when the State intervened, the Federal Court practically turned the case over for determination to the State Court. We think it had no authority to do this, and that the Circuit Court of Appeals, upon the record before it, should have issued the writ of mandamus to re-

quire the Judge of the Circuit Court of the United States to show cause why he did not proceed to hear and determine the case."

Again, in *Barber Asphalt Company vs. Morris*, 132 Fed. 945. Circuit Court of Appeals of the Eighth Circuit in the above case a writ of mandamus was issued to the trial Court ordering him to proceed and try the case notwithstanding the fact that a prior suit involving the same parties and same issues was pending in the State Court, and in this case the Court say:

"The petitioner invoked the jurisdiction of the United States Circuit Court in an action to determine the simple question of debt or no debt between him and a citizen of another state. Actions for the same cause between the same parties were pending in the State Court. It was the duty of the Judge who held the Circuit Court to proceed with convenient speed to try and by means of the exercise of his own independent judgment to adjudicate the petitioner's controversy. He stayed all proceedings in the cause before him until that controversy should be finally determined by the Courts of the State. This stay deprived the petitioner of its rights to the independent judgment of the national Courts upon the merits of its action and destroyed the jurisdiction of this Court to review the adjudication which may be made upon it in the Court below."

The Circuit Court of Appeals for this Circuit has also announced the same rule. In the case of *Bunker Hill Mining Company and Sullivan Mining Company vs. Shoshone Mining Company*, 109 Fed. 508, Circuit Court of Appeals of the Ninth Circuit, the Court say:

“What effect, if any, should be given to the plea in relation to the pendency of the action in the State Court concerning the title of the Ibex and Kirby Fraction lodes, waiving all objection to the form of the plea and facing the question upon its merits as a plea in bar, and upon the theory as argued by appellee that both suits are between the same parties and involve the same issues. We are clearly of the opinion that it is wholly insufficient and that the Court erred in sustaining it. Although, in former years, there was considerable controversy and much conflict of opinion upon this point, it must now be considered as settled, that the pendency of a prior suit in a State Court can not be pleaded in bar to a suit in the Federal Court, even between the same parties and involving the same issues.”

Under the most liberal rule, it has always been held that it is a matter entirely within the discretion of the trial Judge as to whether or not a case pending in the Federal Court should be abated or continued during the pendency of a similar action in the State Court, and under this rule the appellant is not entitled to any relief as the trial Judge exercised his discretion and denied the application.

Was the transfer of the property of the plaintiff corporation for the purpose only of conferring jurisdiction on the Federal Court?

We deem it to be a complete answer to this question to call the Court's attention to the facts as shown by the record, in the stipulation of facts, page 47, folio 54, Tr., it is stated:

“And it is also further admitted that the trustees, H. M. Coffin, John McMillan and F. H. Par-

sons, trustees mentioned in the trust agreement and in the trustees' deed, have during all the times mentioned in the complaint been citizens and residents of the State of Idaho, and were not citizens or residents of the State of California."

These three persons just mentioned were the immediate grantors of the California Land Company. (Plaintiff's Exhibit "D," Tr. page 79.)

Now, the record shows that the immediate grantors of the California Land Company, all being residents of the State of Idaho, could have prosecuted this action in the United States Court in the same manner and to the same effect as the complainant company. Therefore, it was unnecessary to convey these lands to the California Land Company or to any other person in order to invoke the jurisdiction of the Federal Court.

In the case of *Manhattan Life Ins. Co. vs. Broughton*, 109 U. S. 121, the Court say:

"Mrs. Ferguson, the assured and payee named in the policy, was herself a citizen of New Jersey, and as such, if no assignment had been made, might have sued the company in the Circuit Court of the United States; and Bromfield, a citizen of the same State, was appointed in the stead of the former trustee, a citizen of New York, not by Mrs. Ferguson's deed in pais, but by a Court of competent jurisdiction. Under these circumstances the mere fact that one object in having him appointed was to enable a suit to be brought in the Circuit Court is not sufficient to require or justify the construction that he was improperly, and it cannot be pretended that he was collusively, made a plaintiff for the purpose of creating a case cognizable by that Court. The question

involved was not a question of local law, but of general jurisprudence, upon which Mrs. Ferguson, and Broughton, as her trustee, had a right to seek the independent judgment of a Federal Court. *Railroad Co. vs. Lockwood*, 17 Wall. 357, 368; *Mich. Cent. R. Co. vs. Myrick*, 107 U. S. 102; (S. C. 1 Sup. Ct. Rep. 425) *Burgess vs. Seligman*, 107 U. S. 20 (S. C. 2 Sup. Ct. Rep. 10)."

In the case of *Ashley vs. Board of Supervisors*, 83 Fed. 534, Circuit Court of Appeals of the Eighth Circuit, in the opinion the Court say:

"We think it is very clear that, as these bonds were payable to bearer, if the transfer from the bank to Whitbeck was a real one, in good faith, and not colorable merely, and collusive, the jurisdiction of this Court cannot be defeated by reason of any objection that can be made to the transfer from Whitbeck to Ashley. Whitbeck being a citizen of the State of New York, if the transfer to him was a real one the case was then one properly within the jurisdiction of the Circuit Court, and the transfer from Whitbeck to Ashley could not create "a case cognizable or removable" in or to the Courts of the United States. The facts necessary to jurisdiction were already complete, unless the transfer from the bank to Whitbeck could be successfully assailed."

In *Stanley vs. Board*, 15 Fed. 493, the Court said:

"The demands in suit were first assigned to Mr. C. P. Williams, a citizen of this State. Williams thereafter assigned to the plaintiff, in circumstances which would probably require a dismissal of the suit, pursuant to the fifth section of the act of March 3, 1875, were it not for the fact that the Court had jurisdiction prior to and irrespective of the assignment. That the plaintiff's immediate assignor might have maintained this action, because the controversy is one arising 'un-

der the laws of the United States', was directly decided on the former trial, and is *res adjudicata* in this Court. The assignment was not made for the purpose of 'creating a case' within the jurisdiction of the Court, for such a case was already in existence. As the Court must, in any event, retain jurisdiction, an inquiry into the relations existing between the plaintiff and his assignor can lead to no tangible result. Where a party, who is entitled to sue in the Federal Courts, transfers his cause of action to another, who has the same right, of what moment is it that the transfer was for an adequate consideration, or was wholly without consideration, so long as the legal title is transferred? The defendant has no reasonable ground for complaint, and the Court, for whose advantage the statute was framed, has not been imposed upon or burdened with an improper or collusive controversy.

"What was thus said is applicable to the question here presented. In this view, we put aside the transfer from Whitbeck to Ashley and pre-termit any discussion of the testimony relating to that transfer. The question then remains, was the transfer from the bank to Whitbeck a real one, or colorable and fraudulent? It is to be observed that it has been uniformly held that the fact that the purpose of the transfer was to enable the purchaser or vendee to bring suit in the Courts of the United States does not affect the question. The cases fully recognize the right to transfer or convey with just such motives as this, provided the conveyance or transfer is a real one, intended to be final without reservation, and not solely for the purpose of giving jurisdiction. This doctrine was announced in the late case of *Manufacturing Co. vs. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, in which previous cases are reviewed. The motive for transfer in such cases is to be regarded as a circumstance to be considered in connection with all the other circumstances

of the case in determining whether the transfer is real. If, in a given case, the sale or transfer is real, the existence of a motive to confer jurisdiction on the Courts of the United States does not invalidate the transfer nor defeat the jurisdiction."

Again, on page 539, the Court say:

"As we have said, if the sale by the bank to Whitbeck, through Moore, must be regarded as a valid and real one, the jurisdictional conditions were then complete, and the sale by Whitbeck, already competent to sue in the Federal Courts, to Ashley, could not have made, and could not have been intended to make or create a case cognizable in the Courts of the United States."

Prior to the time of the conveyance from the trustees to this plaintiff, the trustees would have been the proper parties to have prosecuted this action, the beneficiaries are not necessary or proper parties and the citizenship of the trustees is what fixes the jurisdiction of the Federal Court, and not the citizenship of the beneficiaries.

"Where the cause of action is vested in a trustee, and the action is brought by him, his citizenship, and not that of those who are beneficially interested, determines the question of jurisdiction. *Knapp vs. Troy & B. R. Co.*, 20 Wall. 117.

"*Whitman vs. Hubbell*, 30 Fed. 82; *May vs. St. John*, 38 Fed. 771; *Goodnow vs. Litechfield*, 47 Fed. 753; *Reinach vs. Atlantic & G. W. R. Co.*, 58 Fed. 38; *Ship vs. Williams*, 10 C. C. A. 248, 22 U. S. App. 380, 62 Fed. 6; *Popp vs. Cincinnati H. & D. R. Co.*, 96 Fed. 467; *Cincinnati H. & D. R. Co. vs. Thiebaud*, 52 C. C. A. 542, 114 Fed. 922; *Hunter vs. Robbins*, 117 Fed. 922.

"Where a suit to foreclose a trust deed is brought in the name of the trustee named therein,

the fact that the beneficiary in the trust deed is a citizen of the same State as the defendant will not, if the trustee is a citizen of a different State, defeat the jurisdiction of the Federal Court. *Dodge vs. Tulleys*, 144 U. S. 451, 12 Sup. Ct. Rep. 728."

Again we maintain that it has been uniformly decided by the Federal Courts that persons have a right to organize a corporation even if said organization was had for the sole purpose of enabling the corporation to sue in the Federal Courts, provided, the organization was in good faith and permanent in character.

Upon this issue the burden of proof was on the appellant herein to establish to the satisfaction of the Court that the organization of this corporation was collusive and for the sole purpose of conferring jurisdiction upon the Federal Court. The only evidence upon this question which was introduced upon the trial is the stipulation of facts filed in the case. From a reading of this stipulation the Court will see that it is agreed between the parties to this action that the reasons for the organization of this corporation were many, and set forth in full in said stipulation (page 45, folio. ., Tr.).

There is absolutely no evidence contained in this stipulation of facts which would justify the Court in holding the organization of this corporation collusive or in violation of the statutes of the United States in such cases made and provided.

In the case of *Irvine Co. vs. Bond et al.*, 74 Fed. 849, (a case decided by the Circuit Court of the

Southern Division of California). The facts in the above case tending to show that the conveyance to the corporation in that case was collusive and fictitious and merely for the purpose of invoking the Federal jurisdiction were much stronger than in the case at bar. The facts, as set forth by Ross, Circuit Judge, in the opinion commencing on page 851, are as follows:

“He sent one of his attorneys at law to the State of West Virginia for the purpose of causing to be organized under the laws of that State the complainant corporation, called the Irvine Company, with the intention of conveying to that corporation the property described in the deed executed by him to the complainant. With that end in view, one of the attorneys for James Irvine went to Charleston, W. Va., and there employed the firm of Chilton & Thayer to incorporate the Irvine Company under the laws of that State. The agreement under which that was done was that Chilton & Thayer should procure the necessary number of citizens of the State of West Virginia to execute articles of incorporation under the laws of that State, each of whom should subscribe for enough of the stock of the corporation to make their action legal and perfect the organization by the election of officers, and thereupon adopt by-laws and a seal, and then pass a resolution authorizing a meeting of the stockholders under the by-laws, to be held in Los Angeles, Cal., whereupon each of the stockholders should execute a proxy to the attorney of James Irvine, whereby he could vote their stock at such meeting. This agreement was carried out, and the Irvine Company was incorporated under the laws of West Virginia. The purposes of the company, as expressed in the articles of incorporation, were: ‘Acquiring water rights, constructing waterworks and systems for distribution, use and

sale of water for irrigation, domestic use, power purposes, and other useful objects; carrying on the business of stock and general farming, and therein acquiring real and personal property, and holding, using and disposing of the same in any manner; constructing, maintaining and disposing of power plants and power systems for use, distribution and sale of dynamic energy; constructing, maintaining and operating telegraph and telephone or other lines of communication; and, in connection with its business, constructing, maintaining and operating railroads with car service to be propelled by electric or other power; and, in connection with its business, doing any and all things that a natural person might or could do with its property acquired in whatsoever manner.' The articles of incorporation provide that the corporation shall keep its principal office or place of business at Charleston, in the County of Kanawha, State of West Virginia, and recite that the incorporators 'have subscribed the sum of five hundred dollars to the capital thereof, and have paid in on said subscriptions the sum of fifty dollars, and desire the privilege of increasing the said capital by the sale of additional stock, from time to time, to five million dollars in all.' 'The capital so subscribed,' proceed the articles of incorporation, 'is divided into shares of one hundred dollars each, which are held by the undersigned respectively as follows,' that is to say: By John A. Thayer, one share; H. P. Devenshire, one share; Bilton McDonald, one share; A. W. Jackson, one share; F. H. Scott, one share—all of Charleston, West Virginia. The articles of incorporation further declare that 'the capital to be hereafter sold is to be divided into shares of the like amount.' The \$50 actually paid by the incorporators, although nominally advanced by them, were so advanced under the agreement that the advances should be repaid by James Irvine, and were so repaid, as were also all other moneys

expended in and about the incorporation of the complainant company and in payment for its stock. The attorney for James Irvine immediately returned to California, with a proxy from each of the incorporators to vote their stock at a meeting to be held in California pursuant to the resolution passed in West Virginia, authorizing a meeting of the stockholders under the by-laws, to be held at Los Angeles. Prior to the holding of that meeting, one share each of the stock was issued to three persons, each of whom was in the employ of James Irvine. Those three, together with the attorney of James Irvine, who held the proxy of the West Virginia incorporators, held a meeting in Los Angeles, at which the West Virginia directors and officers, through the attorney of James Irvine, who held their proxy, tendered their resignation to the three employes of James Irvine, to whom one share of stock each had been issued. Those three accepted the resignations so tendered, and proceeded to elect themselves officers of the corporation. All of the citizens of West Virginia, who thus incorporated themselves as the Irvine Company, thus speedily dropped out of the company, and the corporation which, according to the express declaration of its articles, was required to 'keep its principal office or place of business at Charleston, in the County of Kanawha, and State of West Virginia,' and was to continue until June 1, 1944, was thus, in the year 1894, transferred to the city of Los Angeles, State of California. To the corporation thus formed, James Irvine subsequently, and on July 27, 1894, executed a deed, purporting to grant to the Irvine Company all of his right, title and interest in and to the Rancho Lomas de Santiago, and in and to the San Joaquin Rancho, and in and to the Rancho Santiago de Santa Ana, in consideration of 10,000 shares of the stock of the complainant corporation of the par value of \$1,000,000, which were issued and delivered to him.

Subsequently he executed to the complainant corporation a conveyance of all of the personal property on the land described in his deed to the company in consideration of the issuance and delivery to him of 1,000 shares of the stock of the complainant corporation, of the par value of \$100,000. One other share of the stock was issued to Frances Inita Irvine, wife of James Irvine, who was thereupon elected to the board of directors of the complainant company. The evidence shows that for several years prior to the organization of the complainant company James Irvine had been discussing with his counsel the advisability of organizing a corporation to which to convey the property above mentioned, having in view the development and operation of it to greater advantage than could result with the title in himself. The evidence shows that he contemplated subdividing the lands and introducing an extensive and expensive irrigation system, among other things, and that, as he was possessed of other property than that here mentioned, it would be to his advantage to cause a corporation to be formed in a State under whose laws there was no individual liability of stockholders, to which corporation he could convey this particular property in consideration of the stock of the corporation, and, through the corporation, develop and operate this property without endangering his other property. The evidence shows that another object of the proposed corporation was to secure by the corporation the right of eminent domain, the exercise of which might become necessary in furtherance of the contemplated scheme of irrigation. Another object, according to the evidence, was the securing of the right to try the title to the property, which was threatened with attack, in the Courts of the United States, through which government the title came to James Irvine. These and other considerations, the evidence shows, induced counsel of James Irvine to advise him to cause the

Irvine Company to be incorporated under the laws of the State of West Virginia, and to perform the other acts hereinbefore recited. The evidence further shows that it was never agreed or contemplated that the title to the property should be recovered to James Irvine, but, on the contrary, that the intention was that the title should remain in the corporation.

"Whatever effect, if any, the transactions attending the organization of the complainant company, and those that followed, might have in respect to the continued existence of the corporation, the Court would not be justified, I think, in view of the evidence that has been introduced, in holding that the conveyance from James Irvine to the complainant company was fictitious and not real. Being real, and intended for what it purported to be, a conveyance of the title of the property to the corporation, the power over which was thereafter vested in a board of directors, and no reconveyance to James Irvine being contemplated, the plea must be overruled. *Manufacturing Co. vs. Kelly*, 160 U. S. 327-336, 16 Sup. Ct. 307, and authorities there cited. An order to that effect will be entered, with leave to the defendants to answer within the usual time."

In the case of *Lehigh Mining and Manufacturing Co. vs. Kelly*, 160 U. S. 327, the Court say:

"None of these cases sustain the contention of the plaintiffs. All of them concur in holding that the privilege of a grantee or purchaser of property being a citizen of one of the States to invoke the jurisdiction of a Circuit Court of the United States for the protection of his rights as against a citizen of another State the value of the matter in dispute being sufficient for the purpose cannot be affected or impaired merely because of the motive that induced his grantor to convey or his vendee to sell and deliver the property provided such conveyance or such sale and delivery was a

real transaction by which the title passed without the grantor or vendor reserving or having any right or power to compel or require a reconveyance or return to him of the property in question, we adhere to that doctrine."

The fact that a complainant corporation was formed and the property transferred to it for the purpose of conferring jurisdiction upon the Federal Courts can in no way affect the jurisdiction of those Courts.

Dickerman vs. Northern Trust Co., 176 U. S. 181, 191, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; McDonald vs. Smalley, 1 Pet. 620, 7 L. ed. 287; Smith vs. Kernochen, 7 How. 198, 216, 12 L. ed. 666, 673; Barney vs. Baltimore, 6 Wall. 280, 18 L. ed. 825; Morris vs. Gilmer, 129 U. S. 315, 328, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289; Cross vs. Allen, 141 U. S. 528, 533, 35 L. ed. 843, 847, 12 Sup. Ct. Rep. 67; Crawford vs. Neal, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; Lake County vs. Dudley, 173 U. S. 243, 254, 43 L. ed. 684, 689, 19 Sup. Ct. Rep. 398; South Dakota vs. North Carolina, 192 U. S. 286.

The case mainly relied upon by the appellant is Miller & Lux vs. East Side Canal & Irrig. Co., 211 U. S. 293, 53 L. ed. 189. But upon an examination of this case, the facts are entirely different and the case has no application. In the Miller and Lux case, a California corporation caused a Nevada corporation to be organized and transferred its property to the Nevada corporation. Each director of the California corporation was an incorporator of the Nevada corporation. The directors of the California corporation became and were also the directors of the Nevada corporation. Each company had the same

president, vice-president, secretary and treasurer, and offices at the same place. It was found by the Court that the said corporations "were the same in name, purposes, capitalization, directors, officers, offices and place of business." All these elements are wanting in the case at bar, and in the opinion the Court say:

"The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation, which remained in existence with full power, as the owner of such stock, to control the operations of the Nevada corporation. If, before the institution of this suit, the California corporation had distributed among those entitled to it the stock of the Nevada corporation, issued to it as fully paid-up stock, and had then ceased to exist or been dissolved, a different question might have been presented. But such is not this case. As the facts were, when this suit was brought, the California corporation could at any time, even after this suit was concluded, have required the Nevada corporation, without any new or valuable consideration to surrender all its interest in the property which it had obtained from the California corporation for the purpose of acquiring a standing in the Circuit Court of the United States. In other words, the Nevada corporation had no real interest in the property. Its ownership was a sham, in that it could at any time after the bringing of this suit have been compelled by the California corporation to dismiss the suit and abandon all claim to the property in question. It took the title only as a matter of form, in order that the California corporation, or the stockholders interested in it, might, under the name of the Nevada corporation,

invoke the jurisdiction of the Federal Court and avoid the determination of the rights of the parties in the Courts of the State. *Barney vs. Baltimore*, 6 Wall. 280, 288, 18 L. ed. 825, 827. The prosecution of the suit was really for the benefit of those who were interested in the California corporation.

"We do not intend by what has been said to qualify the general rule, long established, that the jurisdiction of a Circuit Court, when based on diverse citizenship, cannot be questioned upon the ground merely that a party's motive in acquiring citizenship in the State in which he sues was to invoke the jurisdiction of a Federal Court. But that rule is attended by the condition that the acquisition of such citizenship is real, with the purpose to establish a permanent domicile in the State of which he professes to be a citizen at the time of suit, and not fictitious or pretended."

Counsel for the appellant argues that because the property was transferred to the California Land Company immediately after its organization and that that corporation immediately filed this suit to quiet title to its property that these facts are some evidence that the organization of the corporation and the transfer to it of the property was for the sole purpose of conferring jurisdiction on this Court. However, we take it that under the facts in this case no such presumption can exist. The record in the case discloses the fact that the property involved is real estate and worth over \$300,000. That there was a *Lis Pendens* filed and an action pending in the State Court which cast a cloud upon the title to all of this property. It was of the utmost importance that this cloud be removed at the earliest opportunity. The corpor-

ation can not sell one acre of this land or incumber it in any way until the cloud be removed. This is the reason for the bringing of this action.

ARGUMENT ON THE MERITS.

The District Court committed no error in entering a decree quieting plaintiff's title. Under the defendant's answer and the evidence introduced upon the trial, the defendant was entitled to no relief.

Conceding only for the purpose of argument that the instrument set forth in the record and under which the complainant derived its title was in fact a mortgage, yet, the defendant having conceded in his answer (Tr. p. 13) that there is a large amount due under said trust deed or mortgage, and the evidence showing that on October 21, 1915, there was the sum of \$264,400 with interest thereon due under said trust deed or mortgage (Tr. page 93, folio 102). The appellant not having made any tender of amount conceded to be due, or offered in any manner to pay any amount which the Court should find to be due, the answer is not sufficient to constitute a defense.

In *Jones on Mortgages*, 7th Add., Sec. 342, the rule is stated as follows:

"A bill in equity may be maintained to redeem as from a mortgage land which the defendant holds by deed from the plaintiff upon evidence that the deed though absolute in form was really taken as security for a loan under the rule that 'he who seeks equity must do equity,' the grantor must fulfill or offer to fulfill all the obligations of a mortgagor."

"The bill to redeem must make a tender of the

amount plaintiff concedes to be due on the mortgage debt, or must offer to pay whatever may be found to be due."

Jones on Mortgages, 7th Add., Sec. 1095.

"In a suit to redeem, the complaint must show a tender of the amount due before the bringing of the action or there must be an offer in the bill to pay what is due or whatever sum may be found due. To obtain equity there must be an averment of willingness and ability to do equity."

Pomeroy's Equity Jurisprudence (2nd ed.), Sec. 1219.

This rule has been announced in California in the case of Hughes vs. Davis, 40 Cal. 117. In the above case the Court say:

"The answer sets up facts showing that the transaction was a loan and mortgage to secure the payment of the money and interest. The principal sum had become due and remained unpaid. The money having become due, it was incumbent on the defendant if he desired to have the Court declare that in equity the transaction constituted a mortgage, to offer to redeem. He cannot demand equitable relief, in respect to the contract, while failing to perform his part of it. He should do equity by offering to redeem when seeking equity by having the deed declared a mortgage. There is no shadow of doubt in my mind that equity requires the defendant to pay or tender the money loaned before he deprives the plaintiff of the right of possession which flows from the deed."

In Burns vs. Hiatt, 87 Pac. 196, the Supreme Court of California say on page 197:

"The only way for a party in respondent's position to quiet a mortgage is to pay it. * * * * Respondent can have no remedy in the premises without paying or tendering the amount due ap-

pellant on his mortgages.' The same rule was previously applied in *Booth vs. Hoskins*, 75 Cal. 276, 17 Pac. 225, which was also an action to quiet title by a mortgagor in possession, and in which the mortgage debt was barred by the statute of limitations. In *Spect. vs. Spect*, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314, which was an action in ejectment by the successor of the mortgagor against a mortgagee in possession, it was pointed out that the rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. It was there said: 'Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the Court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the Court will deny him the relief he seeks, except upon the conditions that he shall do that which is consonant with equity.'

In the case of *Mack vs. Hill*, 72 Pac. 308, the Court say:

"Appellant commences his brief with the statement that 'this action is brought to declare a deed, absolute on its face, a mortgage.' In *Cowing vs. Rogers*, 34 Cal. 648, the Court said: 'No precedent is cited of an action instituted for the sole purpose of having an absolute deed declared a mortgage.' This language is quoted with approval in *Cline vs. Robbins*, 112 Cal. 581, 44 Pac. 1023. We have searched the books diligently, but in vain, for such a case, and quite agree with the suggestion of the Supreme Court of California. The fact of declaring this deed a mortgage, and

stopping there, might compel the respondent to bring an action to foreclose it. Courts will not try lawsuits by piecemeal. They incline to the maxim: 'It is for the public good that there be an end to litigation.'

"In *Cowing vs. Rogers*, supra, it is said: 'If the position of the plaintiff is correct that, notwithstanding this action and a judgment in his favor declaring the deed to have been intended as a mortgage, it is necessary for the grantee to foreclose the mortgage in order to realize the money intended to be secured, then the present suit was essentially idle and useless.' And again: 'It is very clear that when he does sue, offering to redeem and praying that the premises may be reconveyed to him, the Court is authorized, if the facts warrant it, to declare that the deed, absolute in its terms, was intended as a mortgage, and to prescribe the terms of redemption and reconveyance. Such judgment is as binding upon the grantor in respect to the redemption as upon the grantee in respect to the character of the instrument and the reconveyance. It is one of the incidents of a mortgage that, where the mortgagor seeks the aid of a Court of equity in effecting a redemption, the Court may prescribe the terms of the redemption.'

"If the appellant desires the Court to declare that, in equity, the transaction between himself and respondent constitutes a mortgage, he must offer to redeem. He cannot fail to perform his part of the contract and demand that equity be done. He must place himself wholly within the jurisdiction of the Court to settle the entire controversy. See *Hughes vs. Davis*, 40 Cal. 117. In commenting on the maxim, 'He who seeks equity must do equity,' Mr. Pomeroy observes: 'It says, in effect, that the Court will give the plaintiff the relief to which he is entitled, only upon the condition that he has given, or consents to give, the defendant such corresponding rights as he also may

be entitled to in respect of the subject-matter of the suit.' 1 Pomeroy's Equity Jurisprudence, Sec. 385. This the plaintiff has not done or offered to do."

In the case of *Machold vs. Farnan*, 117 Pac. 410, the Court say:

"From the holding of numerous authorities it seems that the general rule is that it is not necessary that there be any provision in the decree for the sale of the property when the Court finds the deed and agreement to be a mortgage because the action is not an action to foreclose, and therefore the usual order of sale in foreclosure cases is not required. *Cowing vs. Rogers*, 34 Cal. 648; *Cline vs. Robbins*, 112 Cal. 581, 44 Pac. 1023; *Mach vs. Hill*, 28 Mont. 99, 72 Pac. 307; *Decker vs. Patton*, 120 Ill. 464, 11 N. W. 897; *Martin vs. Ratcliff*, 101 Mo. 254, 13 S. W. 1051, 20 Am. St. Rep. 605; *Rodman vs. Quick*, 211 Ill. 546, 71 N. W. 1087."

The action referred to in the appellant's answer as being pending in the State Court was an action to have the deed to be declared in effect a mortgage and to enjoin the trustee from selling the property after the default of appellant as provided for in the trustee deed. The action in this Court is practically to the same effect, and, speaking upon these questions, the Supreme Court of California, in the case of *Meetz vs. Mohr*, 141 Cal. 667, 75 Pac., page 208, say:

"The plaintiff did not make any tender, nor meet defendants' offer to accept a part of the amount claimed to be due, as already stated. Under these circumstances the Court was clearly right in dissolving the injunction. 'A sale under a trust deed will not be enjoined when it appears by complainant's own showing that no sale would

be made if he should pay what he admits to be due and what he avers his ability and willingness to pay."

High on Injunctions, Sec. 452.

"From the showing made in the Court below, it clearly appears that all appellant had to do to prevent the threatened sale was to pay the testator's debt, then overdue, to the defendant, Rudolph Mohr, and which sale in case of non-payment was authorized by the deed of trust. There is no claim on the part of appellant that she has been prejudiced by the substitution of trustees, or on account of the sale not having been otherwise advertised.

"One who seeks equity must do equity, and the plaintiff in his case did not do so before bringing the action, and further failed and refused to do equity when an opportunity was offered at the hearing of the motion. The order of the Court below, therefore, dissolving the injunction, under the circumstances was right and proper."

In the case of *Cline vs. Robbins*, 112 Cal. 581, 44 Pac., at 1023, the Supreme Court of California, in the syllabi, say:

"An action to have a deed absolute on its face declared a mortgage, and for an accounting and other relief, is in the nature of a bill to redeem, and the decree should not be for foreclosure, but that on payment of the amount due within a reasonable time, to be fixed by the Court, the mortgage shall be adjudged to be satisfied, and that if not so paid the action shall be dismissed."

In the case of *Mersfelder vs. Spring*, 139 Cal. 593, 73 Pac., page 452, the Supreme Court of California, in the syllabi, say:

"Where a trust deed expressly stipulates that the recitals in the deed as to default and publica-

tion shall be conclusive proof that the condition on which the trustee is authorized to sell have been complied with, and that the deed, with such recitals, shall be conclusive against the party of the first part, and a deed given by the trustee recites compliance with such conditions, no question can arise, in an action at law involving the legal title conveyed by the trustee's deed, as to whether the conditions had been in fact complied with."

In the case of *Scott vs. Lambert*, which was an action to quiet title, 132 Pac. 1145, the Supreme Court of Colorado say:

"Whenever it is stipulated in the trust deed, as it is in this case, that the recitals in the trustee's deed shall be prima facie evidence of the facts therein stated, it is very generally held that the trustee's deed is admissible in evidence without extraneous proof of any matters which are recited in the trustee's deed as existing facts. *Empire Co. vs. Gibson*, 22 Colo. App. 617-619, 126 Pac. 1103; *Webster vs. Kautz*, 22 Colo. App. 111-117, 123 Pac. 139; *Bent-Otero Improvement Co. vs. Whitehead*, 25 Colo. 354-359, 54 Pac. 1023, 71 Am. St. Rep. 140; *Jesson et al. vs. Texas Land & Loan Co.*, 3 Tex. Civ. App. 25, 21 S. W. 624, 626; *Carey vs. Brown*, 62 Cal. 373, 375; *Beal vs. Blair*, 33 Iowa, 318, 323; *Ingle vs. Jones et al.*, 43 Iowa 286, 293; *Savings & Loan Society vs. Deering*, 66 Cal. 281, 286, 5 Pac. 353; *Tartt vs. Clayton*, 109 Ill. 579; 2 *Jones on Mortgages* (6th ed.), Sec. 1895.

"It has further been held by this and a former Court of Appeals that: 'Even where the deed of trust does not provide that the recitals in the trustee's deed shall be prima facie evidence of the facts therein stated, it is held that such recitals are prima facie proof of the matters stated in them.' *Empire Co. vs. Stratton*, 22 Colo. App.

577, 581, 126 Pac. 1084; *Empire Co. vs. Howell*, 22 Colo. App. 389-391, 125 Pac. 592; *Ensley vs. Page*, 13 Colo. App. 452-454, 59 Pac. 225; *Carico vs. Kling*, 11 Colo. App. 349, 351, 53 Pac. 390."

It has become a settled law of California that under a trust deed containing a power of sale given as security for a debt that upon default, the trustees may sell the property as provided by the terms of the instrument, and that such sale and the trustee's deed thereunder will convey a good title to the property. It is unnecessary to cite all the decisions of this State upon that question, for these trustee's deeds have always been upheld. The question was thoroughly discussed and finally decided in the case of *Bank vs. Alcorn*, 121 Cal. 379, 53 Pac. 813, wherein the Court say:

"The appeal is supported by very elaborate and forcible briefs, which, if the questions were open for consideration, would challenge and receive serious and careful examination; but we do not think the matter can be now considered open for discussion. Our own records will disclose the fact that trust deeds have been quite frequently used as security for loans. Their validity has been upheld in numerous cases, beginning very soon after the adoption of the Code, and continuing until the present time. *Bateman vs. Burr*, 57 Cal. 480; *Durkin vs. Burr*, 60 Cal. 360; *Carey vs. Brown*, 62 Cal. 373; *Loan Soc. vs. Deering*, 66 Cal. 281, 5 Pac. 353; *Moore vs. Calkins*, 95 Cal. 435, 30 Pac. 583; *Loan Soc. vs. Burnett*, 106 Cal. 528, 39 Pac. 922. These decisions, which have been uniform, establish a conclusion which has become a rule of property, and, however thoroughly we might now be convinced that the rule is erroneous, it should not be disturbed. Doubtless, many people

have invested their money relying upon this construction of the law by the highest tribunal of the State, while those who have executed such deeds have done so with the expectation that they would be held valid. Ruin and injustice would result from such a decision as is now sought. If the question as to whether the rule of stare decisis shall prevail be one of policy, there is here no balancing of the evil done against the good attained. The result would be evil only."

The last expression of the California Courts on this question is found in the case of *Kinard vs. Kaelin*, 134 Pac., on page 374, wherein the Court say:

"Finally, an attack is made upon the legality of deeds of trust. In this behalf it is urged that the power of sale usually granted in such instruments, and appearing in the deed of trust in controversy here, is voidable and legally nonavailable unless preceded by proceedings to foreclose, as in the case of an out and out mortgage. In short, it is the plaintiff's contention that the deed of trust in question must, as a matter of law, be construed and considered as a mortgage, with all of the rights, incidents and obligations thereof. Practically this same point was presented 14 years ago in the case of *Sacramento Bank vs. Alcorn*, 121 Cal. 379, 53 Pac. 813, and there finally and definitely decided adversely to the contention made by the plaintiffs here. The decision in that case has never been overruled, modified, or criticised. On the contrary, it has since been continuously adhered to, and it stands today as the settled law of this jurisdiction."

The declaration of trust upon which the appellee's title is founded is set forth on pages 51-64 of the Transcript. This agreement or declaration of trust has all the essential features of a trust deed and none

of those of a mortgage. It sets forth the rights of the parties; provides that in case of default that the trustee shall proceed and advertise and sell the property. It directs how the proceeds of the sale shall be distributed, and authorizes the trustee to issue a deed to the purchaser. It does not provide for any proceedings in Court for the foreclosure of this instrument, nor does it provide for any deficiency judgment.

These trust agreements have been uniformly upheld by the Courts of California. But independent of the terms and conditions of this trust agreement, we are at a loss to understand upon what theory the appellant contends that this instrument is a mortgage. A mortgage, as we understand it, is generally security for some debt or for the performance of some act on the part of the grantor and in favor of the grantee. In this case, F. F. Doane was not the grantor to Los Angeles Trust & Savings Bank and did not have title to any of the lands mentioned in the trust agreement. These lands were owned by the predecessor in interest of the California Land Company, and we are unable to understand upon what theory the appellant, F. F. Doane, hypothecated or pledged our property to pay his debt.

One important difference between a trust deed and a mortgage is that in one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit. In this case, the appellant could not have executed a mortgage upon the premises, because he could not have made the conveyance

directly to the appellee as he did not have the title to the property.

This mere statement of facts in the case, we believe sufficient to conclusively establish the fact that this trust agreement is not a mortgage.

Respectfully submitted,

ALFRED A. FRASER,

Solicitor for Appellee.

No. 2857

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC COAST STEAMSHIP COMPANY, a
Corporation,

Appellant,

VS.

AXEL HOKANSON,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

SEP 23 1916

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC COAST STEAMSHIP COMPANY, a
Corporation,

Appellant,

vs.

AXEL HOKANSON,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	10
Answer to Cross-interrogatories Propounded to P. I. Carter	91
Answer to Direct Interrogatories Propounded to P. I. Carter	90
Assignment of Errors	183
Certificate of Clerk U. S. District Court to Apostles on Appeal	188
Certificate Regarding Deposition of P. I. Carter	93
Cross-interrogatories to be Propounded to P. I. Carter	89
Cross-interrogatories to be Propounded to C. L. Woods	101
Deposition, etc., of C. L. Woods, for Respond- ents	96
DEPOSITIONS ON BEHALF OF LIBEL- ANT:	
ANDERSON, HENRY	59
Cross-examination	63
GUNDERSON, JACOB C.	34
Cross-examination	40
Redirect Examination	51
Recross-examination	53
Redirect Examination	56

DEPOSITIONS ON BEHALF OF LIBEL-
ANT—Continued:

PETTERSEN, S. A.....	19
Cross-examination	23
Redirect Examination	31
Recross-examination.....	32

DEPOSITION ON BEHALF OF RESPOND-
ENT:

WOODS, C. L.....	96
------------------	----

DEPOSITION ON BEHALF OF CLAIMANT:

HANNAH, C. J.....	70
Cross-examination	74
Redirect Examination	83
Direct Interrogatories to be Propounded to P. I. Carter.....	87
Direct Interrogatories to be Propounded to C. L. Woods.....	98
Final Decree as to Pacific Coast Steamship Company	180
Libel	5
Notice of Appeal.....	182
Opinion and Order to Enter a Decree in Favor of Libelant for the Sum of \$6,500.....	178
Praeipie for Apostles on Appeal.....	1
Statement of Clerk U. S. District Court.....	2
Stipulation and Order Extending Time for Docketing Cause on Appeal.....	189
Stipulation and Order Re Exhibits.....	187
Stipulation for Deposition.....	96
Stipulation for Deposition and Deposition of P. I. Carter.....	86

Index.	Page
TESTIMONY ON BEHALF OF LIBELANT:	
HASSE, CHARLES	146
Cross-examination	146
HOKANSON, AXEL	125
Cross-examination	139
Recalled in Rebuttal.....	176
MARTIN, ROBERT	109
Cross-examination	113
TESTIMONY ON BEHALF OF RESPOND- ENT:	
BANKS, W. H.....	114
Cross-examination	119
Redirect Examination.....	122
POPE, S. T.....	122
Cross-examination	124
SHORENSEN, E.....	169
Cross-examination	172
SILOW, OSCAR	149
Cross-examination	154
Redirect Examination	168

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

THE PACIFIC COAST COMPANY, a Corpora-
tion, and PACIFIC COAST STEAMSHIP
COMPANY, a Corporation,

Respondents.

Praeceptum for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in this court and include in said transcript the following pleadings, proceedings and papers on file herein, to wit:

1. All those papers required by section 1, of paragraph I of Rule IV of the rules of admiralty of the United States Circuit Court of Appeals for the Ninth District;

2. All of the pleadings in said cause and the exhibits annexed thereto;

3. All the testimony and other proofs adduced in said cause including the testimony taken at the trial; all depositions taken by either party and admitted in evidence and all exhibits introduced by either party, the said exhibits to be sent up as original exhibits;

4. The opinion and decision of the Court; [1*]
5. The final decree and notice of appeal;
6. The assignment of errors.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent and Appellant.

[Endorsed]: Filed Aug. 9, 1916. W. B. Maling,
Clerk. By Thomas J. Franklin, Deputy Clerk. [2]

No. 15,773.

AXEL HOKANSON,

Libellant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Statement of Clerk U. S. District Court.

PARTIES.

Libellant: Axel Hokanson.

Respondents: Pacific Coast Company, a Corporation,
and Pacific Coast Steamship Company, a Cor-
poration. [3]

PROCTORS

for

Libellant: WILLIAM B. ACTON, Esquire, and
Messrs. DENMAN & ARNOLD, San Francisco,
California.

Respondents: IRA A. CAMPBELL, Esquire, and
Messrs. McCUTCHEN, OLNEY & WILLARD,
San Francisco, California.

*Page-number appearing at foot of page of original certified Apostles on Appeal.

PROCEEDINGS.

1915.

- January 27. Filed verified Libel, for personal injuries, in the sum of \$20,000.
Issued Citation for the appearance of Pacific Coast Steamship Company, a corporation.
30. Filed Appearance of Pacific Coast Company, a Corporation.
- March 3. Filed Answers of Respondents.
- May 14. Filed Deposition of Jacob C. Gunderson, taken before Francis Krull, Esquire, U. S. Commissioner.
Filed Deposition of S. A. Pettersen, taken before Francis Krull, Esq., U. S. Commissioner.
- June 18. Filed Deposition of Henry Anderson, taken before Francis Krull, Esq., U. S. Commissioner.
Filed Deposition of C. J. Hannah, taken before Francis Krull, Esq., U. S. Commissioner. [4]
- September 11. Filed Deposition of C. L. Woods, taken before W. W. Washburn, Jr., Notary Public at Clallam County, Washington.
Filed Deposition of P. I. Carter, taken before T. W. Holman, Notary Public, in and for the County of Jefferson, State of Washington.

22. This cause this day came on for hearing, in the District Court of the United States, for the Northern District of California, before the Honorable M. T. Dooling, Judge. After hearing duly had, the cause was submitted to the Court for decision.
- October 15. Filed one volume of Testimony, taken in open Court.
- 1916.
- June 5. Filed Opinion, in which it was ordered that a Decree be entered in favor of Libelant, in the sum of \$6,500.
10. Filed Final Decree.
30. Filed Stipulation and Order that Decree dated June 10th, 1916, be cancelled and stricken from the files.
- Filed Decree of Dismissal, as to Pacific Coast Company.
- Filed Final Decree, as to Pacific Coast Steamship Company (\$6,500 and interest).
- July 10. Filed Notice of Appeal. [5]
- July 10. Filed Cost and Supersedeas Bond, in the aggregate sum of \$8,250, with United States Fidelity and Guaranty Co. as surety.
- August 19. Filed Assignment of Errors. [6]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Libel.

To the Honorable M. T. DOOLING, Judge of the
District Court of the United States, for the
Northern District of California:

The libel of Axel Hokanson against the Pacific
Coast Company, a corporation, and the Pacific Coast
Steamship Company, a corporation, in a cause of
damage, civil and maritime, alleges as follows:

I.

That said respondent Pacific Coast Company is,
and at all times herein mentioned was, a corporation
organized and existing under and by virtue of the
laws of the State of New Jersey, and engaged in the
business of operating steamships between ports in
the State of Washington, and ports in the State of
California.

II.

That said respondent Pacific Coast Steamship
Company is, and at each and all times herein men-

tioned was, a corporation organized and existing under and by virtue of the laws of the State of California, and engaged in operating steamships between ports in the State of Washington, and ports in the State of California. [7]

III.

That heretofore, to wit, on or about December 10, 1913, at Seattle, Washington, libelant was hired and employed by said respondents to perform labor and services as a seaman for said respondents on the steamer "Senator," owned by said respondent Pacific Coast Company, and operated and controlled by said respondents; that on December 10, 1913, said steamer "Senator" left Victoria, British Columbia, on a voyage to the port of San Francisco; that pursuant to said employment libelant was on board said steamer "Senator," acting as a seaman; that the mainsail of said steamer "Senator" was up when the said steamer left Victoria; that there was no downhaul attached to said sail; that said steamer "Senator" was unseaworthy in that no downhaul was attached to said sail; that at about 3:25 P. M. o'clock in the afternoon of said December 10, 1913, when said steamer "Senator" was on the high seas off Cape Flattery, the boatswain of said steamer, who was an officer of and employed by said respondents, and was commanding libelant, was superintending the lowering of said mainsail; that the hanks of said sail, which held it to the jackstay which is fastened to the mast, stuck, and said sail refused to come down; that, as aforesaid, there was no downhaul on said

steamer "Senator," and the sail could not be hauled down from the deck; that said boatswain ordered libelant to climb the shrouds and loosen said sail; that libelant, pursuant to said order, climbed the shrouds to a distance where he stood about forty (40) feet above the deck of said steamer; that ratlines about twelve inches apart traversed the shrouds horizontally, thus forming the steps of ladders for going aloft; that libelant climbed said shrouds, using said steps as aforesaid; that while standing as aforesaid, about forty feet from the deck, the ratline on which libelant stood suddenly and without warning broke, because it was in a rotten, unsafe, dangerous and unseaworthy [8] condition; that respondents knew, or by the exercise of reasonable care, would have known, that said ratline, was in an unsafe, dangerous, rotten and unseaworthy condition; that said ratline broke, as aforesaid, gave way and wholly failed to support libelant, and yielded to his weight, and caused him to fall down from the place where he then stood to the deck of the vessel; that libelant struck the cargo boom while falling to the deck; that by reason of said fall libelant was very severely injured, and suffered a compound mashed fracture of his right leg, above the knee; that he was injured internally and severely bruised, crushed and otherwise injured, and because of such injuries he has been permanently crippled and is permanently incapacitated from work and cannot follow his occupation of seaman, and has suffered, and is still suffering great pain, and has become, and is still, sick, feeble, and ill; that many of the

said injuries so suffered and sustained by libelant, as aforesaid, are of a permanent nature, and that ever since receiving the same, this libelant has been and he will hereafter be, prevented thereby from pursuing his regular employment or business; that by reason of said injuries this libelant has been and is damaged in the sum of Twenty Thousand Dollars (\$20,000); that each and all the aforesaid injuries and damages to libelant were caused directly and wholly by said negligence of said respondents in failing to furnish safe and seaworthy appliances, means and place with and in which to loosen said sail, which this libelant was so ordered by the said boatswain to go aloft to loosen, and in the failure of respondents to provide a downhaul for said mainsail of said ship.

IV.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. [9]

WHEREFORE, libelant prays that said Pacific Coast Company and said Pacific Coast Steamship Company may be cited to appear and answer all and singular the matters aforesaid, and may be decreed to pay to libelant the said Twenty Thousand Dollars (\$20,000), with interest from December 10, 1913, and that libelant may have such other and further relief as in law and justice he may be entitled to receive.

WILLIAM B. ACTON,

DENMAN & ARNOLD,

Proctors for Libelant.

County of Alameda,
State of California,—ss.

Axel Hokanson, being first duly sworn, deposes and says that he is the libelant named in the foregoing libel; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, save as to those matters therein alleged on information and belief and, as to such matters, he verily believes them to be true.

AXEL HOKANSON.

Subscribed and sworn to before me this 25th day of January, 1915.

[Seal]

L. J. MORAN,

Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Jan. 27, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

AXEL HOKANSON,

Libelant,

vs.

THE PACIFIC COAST COMPANY, a Corpora-
tion, and PACIFIC COAST STEAMSHIP
COMPANY, a Corporation,

Respondents.

Answer.

To the Honorable, the Judges of the United States District Court for the Northern District of California :

The answer of Pacific Coast Steamship Company, a corporation, respondent herein, to the libel of Axel Hokanson, libelant herein, admits, denies and alleges, as follows :

I.

Respondent admits the allegations of Article I of said libel.

II.

Respondent admits the allegations of Article II of said libel.

Answering unto the allegations of Article III of said libel, respondent admits that heretofore on or about the 10th day of December, 1913, at Seattle, Washington, libelant was hired and employed by it to perform labor and services as a seaman on board the steamer "Senator," owned by respondent, the Pacific Coast Company, and operated and controlled by respondent; admits that on December 10, 1913, said steamer "Senator" left Victoria, British Columbia, on a voyage to the port of San Francisco; admits [11] that pursuant to said employment, libelant was on board said steamer "Senator" acting as a seaman; admits that the mainsail, sometimes called main try-sail, of said steamer "Senator" was up when the steamer left Victoria; denies that there was no down-haul attached to said sail; denies that said steamer

was unseaworthy in that no downhaul was attached to said sail; admits that at one o'clock, but denies that at about 3.25 o'clock P. M., in the afternoon of said December 10, 1913, when said steamer "Senator" was on the high seas off Cape Flattery, the boatswain of said steamer, who was employed by respondent, and commanding libelant, was superintending the lowering of said sail; denies, however, that said boatswain was an officer of said vessel.

Respondent is ignorant as to whether or not the hanks of said sail, which held it to the jackstay which was fastened to the mast, stuck, and for that reason demands that strict proof be made of the allegations thereof; it admits, however, that said sail refused to come down; denies that either as aforesaid in said article, or otherwise, there was no downhaul on said steamer "Senator," and denies that the sail could not be hauled down from the deck; denies that said boatswain ordered libelant to climb the shrouds and loosen said sail, and in that behalf alleges that libelant voluntarily climbed the shrouds to loosen said sail; denies that libelant, pursuant to said order, climbed the shrouds to a distance where he stood about 40 feet above the deck of said steamer, but in that behalf admits that libelant voluntarily climbed the ratlines and shrouds to the point from which he subsequently fell; admits that the ratlines about twelve inches apart traversed the shrouds horizontally, thus forming the steps of ladders for going aloft; admits that said libelant climbed said shrouds using said steps as aforesaid; denies, however, that while [12] standing aloft, as alleged in said arti-

cle, or otherwise, about 40 feet, or any other distance, from the deck, the ratline on which said libelant stood, suddenly and without warning broke, because it was in a rotten, unsafe, dangerous and unseaworthy condition, and in that behalf alleges that no ratline on which libelant stood broke at any time, and that no breaking of any ratline caused or contributed to his fall.

Respondent denies that it knew, or by the exercise of reasonable care would have known, that said ratline was in an unsafe, dangerous, rotten and unseaworthy condition, and in that behalf alleges that said ratline was not in an unsafe, dangerous, rotten and unseaworthy condition; denies that said ratline broke as alleged in said article, or otherwise, or that it gave way and wholly failed to support libelant, or that it yielded to libelant's weight, or caused him to fall down from the place where he then stood to the deck of the vessel.

Respondent is ignorant as to whether or not libelant struck the cargo boom while falling to the deck, and for that reason demands that strict proof be made of the allegations thereof; admits, however, that by reason of his fall, libelant was very severely injured.

Respondent is ignorant as to whether or not libelant suffered a compound mashed fracture of his right leg above the knee, or whether he was internally bruised, crushed or otherwise injured, or whether because of such injury as he received he has been permanently crippled, and is permanently incapacitated from work, and cannot follow his occupation as a seamen,

or whether he is still suffering great pain, or whether he has become and is still sick, feeble and ill, or whether many of the injuries so received and sustained by libelant, as alleged in said article, are of a permanent nature, or whether ever since receiving his injuries, libelant has been, and will hereafter be, prevented thereby from pursuing [13] his regular employment, or business, and for that reason demands that strict proof be made of the allegations thereof; in that behalf, however, respondent admits that libelant was injured by falling from the shrouds of said mast, and that he suffered pain therefrom, and was thereby disabled for a considerable period.

Respondent denies that by reason of the injuries alleged in said libel, or otherwise, libelant has been, or is damaged in the sum of twenty thousand (20,000) dollars, or at all; denies that each and all, or that any, of the injuries and damages alleged in said article to libelant were caused directly or wholly by the alleged negligence of respondent in failing to furnish safe and seaworthy appliances, means and place within which to loosen said sail; denies that libelant was ordered by said boatswain to go aloft to loosen said sail, and denies that there was any failure of respondent to provide a downhaul for said mainsail of said ship.

Except as hereinbefore admitted, respondent denies each and every of the remaining allegations of said article.

IV.

Answering unto the allegations of Article IV of

said libel respondent denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Further answering unto the allegations of said libel, respondent alleges:

I.

That heretofore and prior to the 10th day of December, 1913, libelant herein shipped and was employed on board the said steamer "Senator" as an able-bodied seaman, and was at the time he received the injuries hereinbefore described, engaged in his [14]. duties on board said steamer as an able-bodied seaman.

II.

That respondent is informed and believes, and so alleges:

That heretofore, on or about the 10th day of December, 1913, while said steamer "Senator" was on the high seas, on a voyage from the port of Seattle, Washington, to the port of San Francisco, California, libelant, with other seamen, was engaged in lowering the main trysail on the mainmast of said steamer; that while being so lowered said trysail, for some unknown reason, stuck, and libelant thereupon voluntarily went aloft to loosen said trysail; that in so doing, libelant climbed the shrouds and ratlines of said mast, and when at the height of said trysail, instead of proceeding to loosen said trysail in a careful and workmanlike manner, said libelant carelessly and negligently and in an unseamanlike manner, removed both feet from said ratlines, and by holding on to one

of said shrouds with one hand only, swung himself bodily away from said shrouds and said ratlines and jumped on to said trysail with both feet; and by so jumping on to said trysail, the same became loosened, and libelant having an insufficient and insecure hold upon said shrouds, lost his hold upon same, and fell to the deck sustaining injuries.

III.

That respondent is informed and believes, and so alleges:

That said steamer "Senator" was in all respects seaworthy and properly manned, equipped and supplied, and particularly were all of the shrouds and ratlines used by said libelant in going aloft on said mainmast in good order and condition; that said accident was caused solely by the aforesaid careless and negligent manner in which said libelant held himself by said shroud and attempted to loosen said trysail, and was not caused or contributed [15] to by any neglect or failure of duty on the part of said steamer "Senator," her officers or crew, or of respondent herein, or of any of its agents or employees, to equip and maintain said steamer, its tackle, apparel and appurtenances in a thoroughly sound and seaworthy condition.

IV.

That libelant, in attempting to loosen said sail as hereinbefore alleged, by going aloft on the shrouds and ratlines of said steamer, by removing both feet from said ratlines, and by holding on to one of said shrouds with one hand only and swinging himself bodily away from said shroud and said ratlines, and

jumping on said trysail, as aforesaid, assumed the risk incident to such employment and the manner adopted and used by him in performing such work, and the injuries resulting therefrom.

V.

That if there was any defect in said trysail, its rigging gear or equipment, or any defect in the downhaul of said sail, or any defects in the shrouds or ratlines of the rigging of the mast carrying said sail, such defect or defects were open, obvious and known to libelant, or could, by the exercise of reasonable diligence, have been discovered by libelant before using same, and if libelant's injuries were *cause* or contributed to by said defects, or any of them, the risk thereof was assumed by libelant.

VI.

That said steamer was, on the commencement of said voyage, fully and properly manned by competent officers and crew, and was fully equipped and supplied with all of the extra gear, ropes, cordage, rods, parts, supplies and equipment necessary to maintain her in an efficient and seaworthy condition, and particularly to maintain said main trysail and the shrouds and ratlines of the mast carrying said sail in a thoroughly sound and seaworthy state; that [16] if said sail or said shrouds or said ratlines were not kept and maintained in a sound and seaworthy condition, such condition was caused by the neglect of said officers or crew to use the gear, ropes, cordage, rods, parts, supplies and equipment on board of said vessel with which said sail, said shrouds and

said ratlines could have been maintained in an efficient and seaworthy state.

VII.

That immediately upon libelant being injured as hereinbefore alleged, he was sent to the United States Marine Hospital at Port Townsend, Washington, where he was given every medical and surgical attention and care by the physician and surgeon of the United States Marine Hospital service; that thereafter, he was brought to San Francisco, California, and given further medical and surgical attention, all of the expense of which in the sum of three hundred eighty-eight and 30/100 (388.30) dollars, have been paid by respondent in accordance with its obligations under the maritime law for medical expenses.

VIII.

That respondent has been paid his wages for more than the contract period of his employment, as required by the maritime law, and has, in fact, paid libelant the sum of two hundred and twenty-five (225) dollars.

WHEREFORE respondent prays that the libel herein may be dismissed with costs.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent, Pacific Coast Steamship
Company. [17]

State of California,

City and County of San Francisco,—ss.

Geo. W. Towle, being first duly sworn, deposes and says:

That he is an officer, to wit, the secretary of Pacific Coast Steamship Company, a corporation, one of the respondents in the above-entitled action; that he makes this verification for and on behalf of said corporation; that he has read the foregoing answer and is familiar with the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

GEO. W. TOWLE.

Subscribed and sworn to before me this 2d day of March, 1915.

[Seal]

JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

Service of the within Answer and receipt of a copy is hereby admitted this 2d day of March, 1915.

WILLIAM DENMAN,

DENMAN & ARNOLD,

Proctors for Libellant.

[Endorsed]: Filed Mar. 3, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

*In the District Court of the United States in and for
the Northern District of California, First Divi-
sion.*

AXEL HOKANSON,

Libellant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Deposition of S. A. Pettersen, for Libellant.

BE IT REMEMBERED, that on Wednesday, February 3, 1915, pursuant to stipulation of counsel hereunto annexed, at the office of T. A. Thacher, Esq., in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., S. A. Pettersen, a witness produced on behalf of the libellant.

T. A. Thacher, Esq., appeared as proctor for the libellant and Milton Mannon, Esq., and Joseph B. McKeon, Esq., appeared as proctors for the respondents, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between

(Deposition of S. A. Pettersen.)

the proctors for the respective parties that the deposition of the above-named witnesses may be taken *de bene esse* on behalf of the libelant at the office of T. A. Thacher, Esq., in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, on February 3, 1915, before Francis Krull, a United States Commissioner for the Northern District of [19] California, and in shorthand by E. W. Lehner.

It is further stipulated that the deposition when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.

S. A. PETTERSEN, called for the libelant, sworn.

Mr. THACHER.—Q. Mr. Pettersen, what was your occupation in December, 1913?

A. Seaman.

Q. What boat were you on?

A. The "Senator."

Q. When did you go on the "Senator"?

A. December 8th or 9th; it was on a Monday, the 8th or the 9th.

(Deposition of S. A. Pettersen.)

Q. The 8th or 9th of December, about that time?

A. Yes, it was on a Monday; I think it was the 8th. The accident happened on the 10th to Hokanson. The 8th it was, yes, exactly; the accident happened on the 10th.

Q. You went on the "Senator" on the 8th of December? A. Yes.

Q. State whether or not Mr. Hokanson was a sailor at the same time. A. Yes.

Q. When was the first time you saw Mr. Hokanson was injured?

A. It was the time when we got called out to put him in the life-saving boat to put him ashore, at Neah Bay, 5 miles inside [20] of Cape Flattery.

Q. What was the condition, Mr. Pettersen,—will you describe it fully, of the rigging on the mainmast of the shrouds and ratlines in particular?

Mr. MANNON.—We object to that question as immaterial, irrelevant and incompetent; it does not appear that this witness is familiar with the rigging on the mainmast, and on the further ground that the question is uncertain as to time.

Mr. THACHER.—Q. Did you see the rigging on the mainmast on December 10th, that is the day of the accident?

Mr. MANNON.—I object to the question as leading; the question should be as to when the witness saw that rigging, if at all.

Mr. THACHER.—I will ask that you answer that, Mr. Pettersen?

(Deposition of S. A. Pettersen.)

A. I was not up on the rigging or anything like that on the 10th; I was up there later on.

Q. How soon were you up on the rigging after the 10th of December?

A. Well, I cannot exactly state the time, but the one time especially when I took notice of the rigging was two weeks afterwards when I was painting the masts. When I painted the masts then I took notice of that rigging, how it was. I was up there very often, you know, but I mean the time when I took special notice of it was that time when I painted the masts.

Q. Were you up there on the voyage of which you were speaking?

A. Well, yes, I have been up on that rigging very often, but I cannot exactly state—it happens so often you know, you don't pay any attention to it.

Q. What was the condition of the rigging?

Mr. MANNON.—I object to that question upon the ground it is uncertain as to time.

Mr. THACHER.—Q. What was the condition of the rigging during the voyage?

A. The condition of the rigging was poor,—very poor. [21]

Q. How was it very poor?

A. Well, simply all the ratlines and everything, they were just like ashes; if you touched anything it just simply dropped; that is the condition of the 7 or 8 top ratlines.

Q. The 7 or 8 top ratlines on the mainmast?

A. On the mainmast.

(Deposition of S. A. Pettersen.)

Q. On the starboard or port side?

A. Both sides were pretty near alike, hardly any difference; on account of the smoke that comes from the smokestack, it catches on the mainmast and it gets greasy and almost catches fire on the mainmast, the smoke that comes from the smokestack it catches on the mainmast and it gets everything greasy, you know, and they almost burn up there, almost burn up the rigging that is on the mainmast; it throws fire out from the smokestack when they are cleaning the fire, and so on, you see.

Mr. THACHER.—That is all.

Cross-examination.

Mr. MANNON.—Q. The bad ratlines were on the 7 or 8 top ratlines. A. Yes.

Q. They were just below the cross-trees, were they?

A. Yes, just below the top; that is, the top ratlines; there is no ratlines further up than that.

Q. How far up from the deck do the ratlines run—how far up, do you know?

A. It must be about 60 feet. Hokanson, he fell further down than that.

Mr. MANNON.—I ask to have that last stricken out as not responsive; it appears that the witness did not see it.

Q. You did not see the accident to Mr. Hokanson at all did you? A. No, I did not see him fall.

Q. You don't know anything about that except what somebody has told you?

A. No, no one ever told me—nobody could tell

(Deposition of S. A. Pettersen.)

anything; [22] there is nothing to be told about it, except that that sail that he was hauling down—

Q. (Intg.) You did not see him haul the sail down?

A. No, I didn't see that; if a person goes up that rigging and has a look at that rigging, you know a person can just guess what happened.

Q. All you know about the accident is what you guessed about where it took place; you did not see it at all? A. No, I did not see it.

Q. How long after Mr. Hokanson was hurt, how long after the 10th of December was it that you saw him taken off the boat?

A. It was the same day, the 10th of December, in the afternoon, about an hour after he was hurt—about half an hour.

Q. About half an hour after he was hurt?

A. Yes.

Q. How far apart are the ratlines?

A. They are about a foot apart.

Q. You did not take any particular notice of the rigging until about two weeks after when they started to paint the boat?

A. Well, I was very often up in that rigging but I never paid any actual attention to it because, you know, I have been up there in the rigging to do things and I never stopped to look at anything; you just look at what you are doing; that is all you have a chance to look at. But this time when I took special notice of the rigging it was when I was painting the mast down.

(Deposition of S. A. Pettersen.)

Q. That is the first time you paid any particular attention to it?

A. Yes, any particular attention to it.

Q. What do the ratlines run between, how many shrouds are there? A. Four.

Q. On what side of the mast are they?

A. On the two sides.

Q. Port and starboard sides?

A. Yes, on both sides.

Q. And between what shrouds on the port side do the ratlines run?

A. They run between the forearm right along.

[23]

Q. So that the ratlines extend clear across and are attached to each of the four shrouds?

A. Yes, they are attached to each of the four shrouds.

Q. Now, when a sailor goes up and down there does he take hold of the shrouds or the ratlines with his hands?

A. He takes hold of the shrouds with his hands, when he goes up the rigging.

Q. When a sailor goes up the rigging he always takes hold of the shrouds? A. Yes.

Q. Why does he do that?

A. The reason why, that is the only solid foundation you have got, is the shrouds, just like that, you see (illustrating); you see the ratlines run across that forward, and there are three seizings and these seizings are very easy to be broke across there; they are very easy to be broke; these here are supposed

(Deposition of S. A. Pettersen.)

to be standard things, shrouds, going up and down, you know.

Q. So that the shrouds are strong and if a man holds on to the shrouds he is not likely to fall?

A. Yes.

Q. If he holds on to the ratlines the ratlines are more likely to break than the shrouds are?

A. Yes, surely so.

Q. Now, these 7 or 8 top ratlines that you are talking about, you think were not in good condition?

A. No, they were in very poor condition.

Q. Did you look at the seizings there to see whether or not they were tied around and on to the shrouds?

A. Yes. You see the ratlines were going across there (illustrating).

Q. Describe it?

A. There was nothing hardly left; they was just simply burned up.

Q. The ratlines were simply in place there, but the seizings were not in good condition at all?

A. There were 7 or 8 ratlines there; the seizings I can't say so [24] much about; but there was hardly anything left of the ratlines, they were burned up, rusted up, they were just like ashes. You might touch them and they would simply drop, at the least little thing, when you touch them, just like ashes, burned up.

Q. What were these ratlines made of?

A. Thin pipes.

Q. They were in such bad condition, if a man had

(Deposition of S. A. Pettersen.)

touched any one of the 7 or 8 top ones they would drop, would they?

A. Yes, they were in very poor condition.

Q. They are the ratlines you are talking about as being in bad condition when you saw them?

A. Well, they were all in poor condition, all the rigging, right down.

Q. And they were in such conditon that if a man had touched any of them they would drop to the deck at once?

A. There was none of them that a person could trust; he would not trust any of them, those ratlines; you could not depend on any of them to carry you up as far as that.

Q. These 7 or 8 ratlines that you say were in bad condition, the 7 or 8 top ones, if a man touched any of those they would drop to the deck right away, they would not hold?

A. A person would think so; I would not depend on any of them, if a person could help it.

Q. In what position were these ratlines when you saw them,—horizontal on the shrouds?

A. Yes.

Q. What sort of a sail was this that Hokanson was going to pull down,—do you know?

A. It was a triangle sail; that sail was made up, you see, and it was hoisted up next the mast in order to be out of the way.

Q. At the top it was fastened to the mast and jackstay?

A. There was a jackstay going up and down the

(Deposition of S. A. Pettersen.)

mast and this sail [25] got stuck on the jackstay, we couldn't get it down, and that is why Hokanson went up there.

Q. So that the sail ran between the jackstay and the mast and the deck; is that right?

A. Well, the jackstay goes up and down the mast, it hangs on the jackstay, and it runs up and down, and the sail was made up this way, and they were trying to pull this down; on account of this smoke and fire coming out from the smokestack, it gets on this sail and it burns it up, burns the sail up; that is why they wanted the sail down; that is why they wanted it down, and it got stuck.

Q. How far above the deck was the bottom of the sail?

A. Well, I guess about 5 or 6 feet, something like that—about 6 feet or something like that.

Q. About 6 feet?

A. About 5 or 6 feet; something like that.

Q. It was more than 3 or 4 feet?

A. Just like a person could reach, something like that.

Q. You could reach the jackstay standing on the deck, reach the bottom of it?

A. Yes, that is what they call the tackle, you could reach that.

Q. And the ratlines on that mainmast extend up to about 60 feet from the deck, you think?

A. Yes, I should think so; maybe more. You see the ratlines go from the boat-deck we call it, and where Hokanson fell was down on the saloon-deck, a

(Deposition of S. A. Pettersen.)

deck further down, where he fell, 8 or 10 feet further down Hokanson fell—I should think about something like 50 feet, between 50 or 60 feet.

Q. You did not see him fall at all?

A. No, I did not see him fall.

Q. What are the seizings made out of on the center about the mainmast?

A. They are made of iron tubes, thin.

Q. The ratlines are made out of pipe?

A. Yes. [26]

Q. Now, how are they fastened on to the shrouds?

A. With marline—what they call marline.

Q. Spun yarn?

A. No, not quite as heavy as spun yarn is.

Q. Did you ever report to anybody about these ratlines that you saw up there?

A. No, I did not; they all seemed to know all about it, so I couldn't report anything to anybody.

Q. Everybody on the boat knew all about it, did they?

A. Yes; the boatswain, after this accident happened, that Hokanson fell down, the boatswain seemed to know all about the rigging; he was talking enough about it.

Q. Did you talk to the boatswain about it?

A. No, he seemed to know more about it than I did.

Q. You did not talk to him about it at all, did you?

A. No, he claimed he had been up there and investigated about the rigging.

Q. He did not tell you that, did he?

A. Yes, he told us there, all of us.

(Deposition of S. A. Pettersen.)

Q. When? A. Shortly after this accident.

Q. What date?

A. The day after, or something like that.

Q. What did he say?

A. He said the rigging was all right, that is, what he saw.

Q. Who was there when he said that?

A. I think you can ask anybody of the crew on the ship, and they can state that.

Q. Who was there when the boatswain said that?

A. Well, that is pretty hard for me to remember now, pretty hard to recall their names, the persons that were there.

Q. Can you recall the names of any of them besides yourself?

A. I think I can recall Henry Anderson and Jack Gunderson—Henry Anderson and Jack Gunderson.

[27]

Q. Henry Anderson and Jack Gunderson?

A. Yes. A person don't take notice of those things, you know, everything that is going on on a ship, when you have got work to do, you can't pay attention to everything.

Q. Whereabouts on the boat was it that this took place, that you and the boatswain had the talk?

A. Outside the forecastle there, in the square.

Q. What was the boatswain's name?

A. The boatswain's name is Oscar Selo—something like that; I don't know exactly; I never saw his name written down.

Q. What boat are you on now?

(Deposition of S. A. Pettersen.)

A. On the "Queen."

Q. Where is she running?

A. Between Seattle and San Diego.

Q. When are you going out again?

A. 5 o'clock.

Q. When do you expect to be back again?

A. I will be back on Friday morning, a week.

Q. How often do you make a round trip between here and Seattle on the "Queen"?

A. We make a two weeks' schedule—we make a round trip in two weeks; we will be back from Seattle Friday morning or Thursday night.

Q. So that you are in this port every two weeks?

A. I am in here twice in two weeks, once going north and once going south.

Q. How long do you stay in port when you are here?

A. Well, we just stay here, coming from the south, like this time, if we have fine weather, we would be in in the afternoon at 2 o'clock—instead of that we came in at 8 o'clock last night; and coming from the north we get in at 10 o'clock and leave at 4 o'clock, just stay in here a few hours—about half a day every time.

Redirect Examination.

Mr. THACHER.—Q. When did you first notice the bad condition of the ratlines? [28]

A. Well, that is pretty hard to say. I never paid much attention to them.

Q. Was it on the first voyage you took?

(Deposition of S. A. Pettersen.)

A. I noticed the ratlines were pretty bad, I noticed that shortly after I came on board the ship. When I specially paid attention to the ratlines, that they were bad, that was about something like two weeks afterwards when I was up painting the rigging.

Recross-examination.

Mr. MANNON.—Q. The very first time you saw the ratlines you could tell they were bad, could you?

A. If you had time enough, you know, to investigate the ratlines, but when you are sent to do a job, do a thing, you can't look around at everything at one time, you know; you can't look at everything at one time; you are just sent up to do a thing, you know, and you simply go to do it, just like everything was all right, and when you have just got this thing to think about, what you are going to do, you can't look at what you are doing and everything else around you at the same time, you know.

Q. And those ratlines you are talking about, you didn't know those were bad until about two weeks after Mr. Hokanson was hurt?

A. I was there at that time, when I was there painting the mast and coming down on the chair, I would look at it; I was sitting in a chair, a piece of board on a rope, and lowering myself down along the mast, and as I was going down I noticed it.

Q. What you noticed then was that there was 7 or 8 top ratlines that were in position but were in you thought very bad condition? A. Yes.

Q. Those 7 or 8 were the top ratlines?

A. Yes. [29]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that in pursuance of the stipulation hereunto annexed, on February 3, 1915, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of T. A. Thacher, Esq., in the Merchants' Exchange Building in the City and County of San Francisco, State of California, personally appeared S. A. Pettersen, a witness called on behalf of the libellant in the cause entitled in the caption hereof, and T. A. Thacher, Esq., appeared as proctor for the libellant and Milton Mannon, Esq. and Joseph B. McKeon, Esq., appeared as proctors for the respondents, and that the said witness being by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the said deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors the reading over of the deposition to the witness and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the clerk of the United States District Court for the Northern District of California.

And I do further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption. [30]

IN WITNESS WHEREOF, I have hereunto set my hand at my office aforesaid, this 31st day of March, 1915.

[Seal] FRANCIS KRULL,
U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed May 14, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [31]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

(Before FRANCIS KRULL, U. S. Commissioner.)
AXEL HOKANON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Deposition of Jacob C. Gunderson, for Libelant.

BE IT REMEMBERED, that on Saturday, February 13, 1915, pursuant to stipulation of counsel hereunto annexed, at the office of T. A. Thacher, Esq., in the Merchants' Exchange Building, in the City

(Deposition of Jacob C. Gunderson.)

and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Jacob C. Gunderson, a witness produced on behalf of the libelant.

T. A. Thacher, Esq., appeared as proctor for the libelant and Ira A. Campbell, Esq., appeared as proctor for the respondents, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the libelant at the office of T. A. Thacher, Esq., in the Merchants' [32] Exchange Building, in the City and County of San Francisco, State of California, on February 13, 1915, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by E. W. Lehner.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are

(Deposition of Jacob C. Gunderson.)

reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is expressly waived.) [33]

JACOB C. GUNDERSON, called for the libelant, sworn.

Mr. THACHER.—Q. Mr. Gunderson, what voyages did you take on the “Senator” in December, 1913?

A. From Seattle to San Francisco—is that what you mean?

Q. Yes. A. From Seattle to San Francisco.

Q. You say you took a voyage? A. Yes.

Q. When did you take your first voyage?

A. The first was—I joined her on the 8th of December.

Q. Was Mr. Hokanson a seaman at that time?

A. Yes.

Q. What was your capacity? A. Seaman.

Q. On that first voyage, when the “Senator” was off Cape Flattery what was done with the main-sail? A. They were trying to lower it down.

Q. What did Hokanson do?

A. He went up aloft to see whether he could get it down or not, because we were unable to get it down from the deck.

Q. How did he happen to do this?

A. Well, being unable to get the sail down from the deck, he was told by the boatswain to go up and see what was wrong with it. Is that what you mean?

Q. Yes, how he happened to go up.

(Deposition of Jacob C. Gunderson.)

A. He went up at the boatswain's order.

Q. Did you hear him give Mr. Hokanson this order? A. Yes.

Q. What did he say?

A. He said, "Go up and see what is the matter with it, Al."

Q. Did you see Hokanson after he got aloft?

A. Yes.

Q. What side was he on?

A. He was on the port side.

Q. What was he doing when you saw him aloft?

A. Well, I saw him standing up there, I did not see him doing anything in particular at the time, because I went around on the other side [34] and tried to pull on it.

Q. How far up was he?

A. He was right up to the upper ratlins.

Q. Did he have hold of anything?

A. He had hold of something when I saw him, standing in the rigging, he had hold with one hand.

Q. What did he have hold of?

A. Well, I can't remember; I didn't take any particular notice of that, but I saw he had his hand extended a little, or raised up a little; I supposed he had hold of the shroud or some tackle, I don't know what it was.

Q. When did you see Hokanson next?

A. I saw him when he was laying on the hatch.

Q. How soon after was this?

A. Well, this was only, I should think a couple of minutes.

(Deposition of Jacob C. Gunderson.)

Q. Did he say anything?

A. Well, I asked him what happened.

Mr. CAMPBELL.—I object to the witness testifying as to what Hokanson said, for the reason that there is no showing that this witness had any authority to bind the company, and on the ground it is purely hearsay evidence.

Mr. THACHER.—Answer the question.

A. Well, he complained about the rigging being rotten.

Q. What did he say? Do you remember specifically what he said?

A. Yes, he said that everything is all rotten—everything is rotten up there.

Q. Will you describe the condition of the rigging on the port side of the mainmast where Hokanson had been standing?

Mr. CAMPBELL.—If he knows.

Mr. THACHER.—Yes, if you know.

A. Yes, I know that it was in very bad shape, that several ratlins were either burned or rusted, I couldn't say exactly; the seizings were bad.

Q. How many were missing?

A. Well, I remember a couple being [35] missing like this, that there was a part of the ratlin missing between the seizings, rusted off, like, and a part was missing that way.

Q. Suppose you draw a picture of it, will you?

A. Yes.

Q. Make "A" where the masthead is.

A. The ratlins run this way; they are very nar-

(Deposition of Jacob C. Gunderson.)

row; there is very little space between the ratlins there.

Q. Up around "A"?

A. Yes, just about space enough for a man to get his foot in between; I noticed that they were burned off here, just how many I could not remember now, but I know about five or six ratlins were in bad shape there, five or six ratlins down from the upper one.

Q. Was that about where you saw him standing?

A. Yes, at the time that I saw him he was up there. Here is the mast, you see, and there was a stay on that mast; there is the sail rolled up, and it is hoisted up on that stay, and that extends right up underneath here, up underneath the masthead, and in order to get up there, to take that sail down, or whatever he was doing, he had to be right up at the top of the rigging.

Q. Did you see any hanging down?

A. I saw one ratlin, yes, that was broke off on one end and hanging down, that I can remember.

Q. Will you mark that "B" about where he was standing when you saw him?

A. Well, you see, to mark just where he was standing, I would have to know the exact ratlin from the top, but I could not swear to that; I could not swear to just what ratlin he was standing on.

Q. But he was up around "A"?

A. Yes, that is the best that I can testify to.

Q. Where were the ratlins in relation to the smokestack?

(Deposition of Jacob C. Gunderson.)

A. The ratlins in relation to the smokestack?
[36]

Q. Yes.

A. You mean what effect the smokestack might have upon them or the fire of the smokestack?

Q. State generally, yes.

Mr. CAMPBELL.—Do you mean whether they were forward or back of the mainmast?

Mr. THACHER.—Yes, and the effect of the smokestack.

A. They were abaft the smokestack.

Q. What effect did the smoke have?

A. Well, the smoke will affect the ratlins.

Q. How?

A. As well as affect anything else, especially when they are burning coal.

Q. How does it affect the ratlins?

A. Well, lots of smoke—that is about the only thing I can say—and fire, once in a while, cinders blowing out of there.

Q. You mean it burns?

A. Yes; you see that quite often when they are burning coal, that cinders are laying right on the deck.

Q. Does the smoke go through these ratlins a good deal of the time? A. It goes by them, I know.

Q. Through them?

A. Yes, through them, right by the mast.

Mr. THACHER.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. How long had you been a

(Deposition of Jacob C. Gunderson.)

seaman on board the "Senator" at this time?

A. This was my first voyage as a seaman.

Q. Your first voyage?

A. Yes. We signed on, I think, the 8th of December, and this happened, I guess, two days afterwards.

Q. Where had you been prior to that time?

A. On the "President."

Q. Where had the "Senator" been running?

A. To Nome previous to this.

Q. She had returned from her last trip to Nome?

A. Well, she [37] had been laid up for a while alongside of the coal bunkers up in Seattle, I think alongside of the coal bunkers she was laying—yes, she was laying alongside of the coal bunkers when we went aboard.

Q. Had you been on her before? A. No.

Q. You did not see Hokanson when he fell?

A. No, I did not see him fall.

Q. You did not see him at the time that he started to fall?

A. No, that is what I mean, I did not see him.

Q. You don't know, then, what he was doing at the time that he actually fell from the rigging?

A. No, I could not say that.

Q. You do know that he went aloft? A. Yes.

Q. You saw him start up the shrouds and ratlins?

A. Yes.

A. And then you went over onto the other side of the vessel? A. Well, when he got up there, yes.

Q. What were you doing on the other side of the

(Deposition of Jacob C. Gunderson.)

vessel? A. I was trying to pull the sail down.

Q. Trying to pull it down?

A. I was trying to pull it down previous to his going aloft, you know.

Q. What was this sail, triangular in shape?

A. Yes.

Q. Three-cornered? A. Yes.

Q. It run on a stay that ran from the masthead to the after part of the vessel?

A. No. Here is the mast, and the stay is running parallel with the mast; that iron stay is fastened to the mast, and with hinges hooked over to that stay.

Q. That is the stay on which the sail ran up and down the mast? A. Yes.

Q. Parallel with the mast? A. Yes.

Mr. THACHER.—If you do not mind my interrupting you, Mr. Campbell, I will offer this sheet as Libellant's Exhibit 1. [38]

(The drawing is marked "Libellant's Exhibit 1.")

The WITNESS.—I can make it plainer, if you want it.

Mr. CAMPBELL.—I just want a general idea as to what kind of a sail it was. The foot of this stay was fastened to the mast just above the deck?

A. Yes, just above the deck.

Q. How were you trying to get it down? Were you trying to pull it down?

A. Trying to pull it down, yes.

Q. What part of the sail did you have hold of trying to pull it down?

A. Well, I will tell you, I can't remember whether

(Deposition of Jacob C. Gunderson.)

there was a downhauler on that sail or not, to pull on.

Q. Do you remember taking hold of the canvas?

A. I can't remember now; if there was a downhauler, naturally I would take hold of it.

Q. Assume there was not a downhauler?

A. Then I would take hold of the rope of the sail.

Q. That is the rope which borders the sail?

A. No, the rope by which the canvas is fastened.

Q. The rope around the outer edge of the sail?

A. Yes.

Q. So that the canvas of the sail was within your reach as you stood on the deck of the vessel?

A. Yes.

Q. You tried to pull this down either by means of the downhauler or by taking hold of the sail, itself?

A. Yes.

Q. Had you helped spread the sail, set it?

A. No, the sail was there when we came aboard.

Q. Hadn't you been using the sail? A. No.

Q. Hadn't it been set at all?

A. No, it had not been set at all.

Q. The sail was stowed away or rolled up, was it, so that it hung perpendicular with the mast?

A. Yes.

Q. Was it rolled up at the time you tried to haul it down? [39] A. Yes, it was rolled up.

Q. Rolled up so that it made a big roll just back of the mast? A. A roll.

Q. See if I can get the right idea from you: Assume that is the masthead. A. Yes.

(Deposition of Jacob C. Gunderson.)

Q. Where is the top of the stay fastened, to the masthead? A. Over along here, you see.

Q. Was the top of that stay fastened to the mast-head?

A. It does not go quite up underneath there.

Q. Is it fastened to an eye-bolt up there?

A. No.

Q. Was it looped around the mast?

A. It is fastened all away along the mast; I don't know how that stay was fastened, but they are on the mast, as a rule, fastened all the way.

Q. Aren't there rings around that stay?

A. I should think those would be riveted onto the mast. I wouldn't say for sure.

Q. In any event, at the time you tried to take the sail down, it was rolled up? A. Yes.

Q. So that it made a roll something like that?

A. Yes.

Q. Which I mark "sail" on the after part of the mast? A. Yes.

Q. You were trying to lower this sail down to the deck? A. Yes.

Q. What do you call the ropes by which you roll the sail up?

A. By which you keep the sail together after it is rolled up?

Q. Yes? A. The gaskets.

Q. Had you taken the gaskets off? A. No.

[40]

Q. You had not taken them off. So you were trying to lower it down to the deck with it still in its

(Deposition of Jacob C. Gunderson.)

gaskets? A. Yes.

Q. What were the ratlines made of? A. Iron.

Q. Iron? A. Yes.

Q. Iron pipes or solid iron?

A. As far as I can remember they were solid iron.

Q. About what size?

A. About the thickness of my finger, I guess.

Q. $\frac{1}{2}$ or $\frac{3}{4}$ of an inch in diameter?

A. I should think about a $\frac{1}{2}$ inch in diameter; I would not say for sure about that; about $\frac{5}{8}$.

Q. $\frac{1}{2}$ to $\frac{5}{8}$ of an inch, would you say?

A. I should think about $\frac{5}{8}$ of an inch.

Q. When these ratlines are in place they are fastened by means of seizings to the shrouds?

A. Yes.

Q. That seizing is a small tarred rope, isn't it?

A. What they call marline.

Q. A small tarred rope that they call marline?

A. They call it marline on board.

Q. Did they have plenty of that aboard the "Senator," do you know?

A. I could not say how much they had on board.

Q. After Hokanson fell did you pick up any of these ratlines, these iron rods, off the deck of the vessel? A. No, not to my recollection.

Q. Did you see any lying around there?

A. No.

Q. Did you hear of anybody picking any up or see any of them lying on the deck?

A. No, I did not see anybody pick any up; I heard

(Deposition of Jacob C. Gunderson.)

somebody say they picked up a ratline kind of forward.

Q. Kind of forward?

A. That is what I heard, I never saw anything of it. [41]

Q. You didn't see any? A. No.

Q. Did you see the place on the mast where these ratlins came from that somebody said he picked up?

A. No.

Q. You did not see any of the ratlins missing, did you, up on the shrouds?

A. It is so long ago now that I can't remember exactly the condition of them up there; I know that there were several of them broke off in the middle and part of the end missing that way, but I couldn't exactly remember the condition to say whether they were entirely out of the seizing, or not.

Q. Isn't it a fact that all of the ratlins—you went aloft afterwards, didn't you? A. Yes.

Q. Isn't it a fact that all of the ratlins were in their position horizontally across the shrouds when you went aloft?

A. They were fastened, with the exception of one ratlin that was hanging down a little on one end, the seizing being carried away.

Q. Except for one ratlin that was down a little at one end, all the other ratlins were in their horizontal position across the shrouds, weren't they?

A. They were in a position in a way—that is, the seizings as far as I can remember were there, but were broken off in the middle.

(Deposition of Jacob C. Gunderson.)

Q. Broken off in the middle, I understand that, but the iron rod was still in a horizontal position across the shrouds, was it not?

A. Yes, as far as I can remember.

Q. With the exception of one ratlin?

A. I took particular notice at the time, to the best of my recollection and I can say that they were broken off in the middle, rusted off and the seizing gone in one and outside of that the seizings were there, as far as I can remember.

Q. The seizings were there and the rods were in their natural position across the shrouds?

A. Yes; you know there [42] is very little space there; there is not much of a space there.

Q. But you know what I mean when I say they were in their natural position across the shrouds?

A. Yes.

Q. Were they or were they not in their natural position across the shrouds?

A. You can't call it exactly natural position when they are broken off, when there is only a part of the ratlin there.

Q. You understand when a seizing is gone—

A. That is the best I can say, that the seizings were not broke off.

Q. The seizings were not broke off?

A. There may have been a seizing broken off, but I took particular notice of the ratlins that were rusted off.

Q. Only this one ratlin that you speak of that was

(Deposition of Jacob C. Gunderson.)

down by the end was tilted down about $\frac{1}{2}$ an inch, was it not?

A. It was down just a little, on one end.

Q. Just a little down on one end. How far?

A. Just how much I couldn't say now. It was hanging in one seizing.

Q. Do you remember making this statement in the presence of Mr. George W. Towle, the attorney for the Pacific Coast Steamship Company, subsequent to the conclusion of this voyage—

A. Do you mean the little gentleman with chin whiskers?

Q. Yes, you made a statement to him, didn't you?

A. Yes.

Q. Do you remember making this statement, that the ratlins stood straight in their seizings with the exception that the upper one at the after end was bent down about $\frac{1}{2}$ an inch?

A. Well, that might have been so.

Q. *You* recollection at the time you made that statement was fresher than it is now, was it not? You recollected better then [43] than you do now?

A. Well, it was not so far off at the time, yes.

Q. You would say that you could recollect about it better then than you do now?

A. Yes. I remember part of it as well now as I did then, but shortly after I had been up there, if I did give a statement then, I could have given it more accurately, I think, because I took particular notice

(Deposition of Jacob C. Gunderson.)

of everything; but in the course of time you are apt to forget the little points.

Q. You remember making the statement that I just read, don't you?

A. Yes, I told him that the ratlin was hanging in one seizing, but just how long the other end was, I don't remember stating, whether I said an inch or so I don't remember. Whatever you have there is what I said, I know that.

Q. When you go aloft what do you consider the seamanlike way of doing, taking hold of the shrouds or taking hold of the ratlins?

A. Well, as a rule when I go aloft if I am in a hurry and I run fast, I take hold of the ratlins, going a little ways, but going up a little higher I generally take hold of the shrouds.

Q. Which do you consider the seamanlike way, taking hold of the shrouds, don't you?

A. Well, we do as a rule. I have seen some good seamen take hold of the ratlins too. It is a little safer, I consider, that is when I go aloft, to take hold of the shrouds.

Q. Do you remember making this statement to the same gentleman I spoke of, that in your judgment good seamanship demanded that a man going aloft or in working aloft, the shrouds should be used as hand-holds where available, and not ratlins? A. No.

Q. You don't remember that?

A. I told him that in going aloft [44] the shrouds should be used as hand-holds, yes, but I told him in working aloft it was different, because when

(Deposition of Jacob C. Gunderson.)

you were up on the ratlines working you are using both hands and you are standing on the ratlines and have hold of nothing, so I could not very well say that in working aloft that it would be better seamanship to have hold of the shrouds.

Q. Mr. Gunderson, in going aloft on these ratlins, the ratlins are immediately in front of your eyes, as you climb up the mast, are they not? A. Yes.

Q. If there is anything wrong with these ratlins in your judgment could Mr. Hokanson have seen them before he climbed on to them with his feet?

A. If they were in bad condition when he went up there?

Q. Yes. A. Yes, naturally.

Q. They were right in front of his eyes before he could get his feet on them, aren't they?

A. Yes, they are right in front of you when you walk by them.

Q. As you climb up the rigging those ratlins are right immediately in front of your eyes, are they not?

A. Yes.

Q. Before you get your feet on to them?

A. Yes.

Q. And they are right in front of your eyes before you get your hands on to them, aren't they?

A. Yes, they are in front of you all the time; you can't help seeing the ratlins; that is a known fact.

Q. Did you see any of the shrouds on this vessel which were broken or gone? A. The shrouds?

Q. Yes, on this side of the mast?

A. No, not that I remember.

(Deposition of Jacob C. Gunderson.)

Q. You never heard of them being gone?

A. No, not that I can remember.

Mr. CAMPBELL.—I would like to offer this drawing which [45] roughly shows the way the sail was furled.

(The drawing is marked Claimant's Exhibit "A.")

Redirect Examination.

Mr. THACHER.—Q. There has been considerable discussion as to which of the seizings were or were not in place. Will you state exactly what the condition of the ratlins was in the place where or approximately in the place where Mr. Hokanson was standing, about how many were missing, if any were missing, and what the condition of the ratlins was? Now, mind you I am not speaking of seizings, I am speaking of the ratlins. Will you state what the condition of the ratlins was?

A. Well, about 5 or 6 of the ratlins were in bad shape.

Q. What do you mean by bad shape?

A. That is what I am trying to get right, that it could be seen that they were in bad shape. Sometimes perhaps a seizing is bad and you can't see it.

Q. How many were missing, if any were missing, of the ratlins?

A. Well, to say any ratlines was gone entirely, I can't remember. As far as I can remember part of the ratlins were there.

Q. When you say missing entirely you mean reaching from the shroud on the outside to the shroud on

(Deposition of Jacob C. Gunderson.)

the inside? A. Yes.

Q. But were there any ratlins which were broken in part? A. Yes.

Q. Or which were missing in part? A. Yes.

Q. About how many?

A. I should say about 5 or 6 ratlins.

Q. They were gone entirely? A. Yes.

Q. That is, gone entirely in some places?

A. Yes.

Q. In what places were those ratlines gone entirely? They might, as I understand it, have been gone in three parts, that is to say, there were three parts of the ratlin up on the highest part of the ship?

A. Yes—there are four shrouds. [46]

Q. And between those four shrouds those ratlins run leaving three parts of the ratlins? A. Yes.

Q. How many of those ratlins were broken in part?

A. I think they were all broken in part, the five or six that I am talking about.

Q. Five or six were broken in part?

A. That is the best explanation I can give.

Q. When you say “broken in part” you mean that there was one of these three devices was gone?

A. Yes.

Q. Now, referring to this ratlin which you spoke of, Mr. Gunderson, suppose you draw a picture of that ratlin in particular?

A. Here is a ratlin; it was broken off here, as far as I can remember; the seizings were there—there might have been—but this is what I took particular notice of, they were rusted off.

(Deposition of Jacob C. Gunderson.)

Q. They were broken off in between here?

A. Yes.

Q. Will you mark those places where you have marked that with an X where they were broken?

A. Yes.

Q. At the places where they were broken?

A. Yes, right here. Here was a ratline gone, and it was hanging down this way, you see.

Q. It was hanging down that way; will you mark that one Y, where it was hanging down? A. Yes.

Q. Now, in regard to seeing the condition of the ratlins, what is the effect of this smoke on the ratlins?

A. Well, the smoke didn't affect the ratlins so much except—well, in the course of time it will, I suppose, but the seizings is what is affected mostly by the smoke.

Q. Now, Mr. Gunderson, do you mean to say that climbing up a [47] shroud that I could tell by looking at a ratlin whether it was going to break or not? A. No.

Q. I could not?

A. No, no. You see a ratline is here, and it is painted, and the seizing on here, and it is apt to look as well as this one here; this one may be almost new, and this one covered with paint, and this one also covered with black paint, and of course anything like that, you couldn't pay any particular attention to.

Recross-examination.

Mr. CAMPBELL.—Q. What you mean to say, Mr. Gunderson, is, then you could not tell whether

(Deposition of Jacob C. Gunderson.)

the seizing was good or not? A. Yes.

Q. But you could tell whether or not a $\frac{1}{2}$ -inch iron rod was rusted through, could you? A. Yes.

Q. You have indicated on this drawing by "Y" the way you say that ratlin was tilted down?

A. Yes.

A. A moment ago you testified that you found one ratlin with one end hanging down about $\frac{1}{2}$ an inch?

A. Yes.

Q. Here you are showing one as having a ratline that went down to a perpendicular position.

A. It doesn't make any difference.

Q. It makes a lot of difference to me.

A. Suppose the seizing is gone here, it then will get out of the seizing a little and hang below the seizing, that is all.

Q. So far as the end that you found tilted down on the outside is concerned—it was the end which had been seized to the outside shrouds, one of the outside shrouds? A. Yes.

Q. That end was tilted down about $\frac{1}{2}$ an inch?

A. Yes, hanging a little lower; just how much lower I could not say.

Q. What would you say, according to your best judgment? [48]

A. As far as I can remember, a little below the seizing.

Q. A little below the seizing?

A. About an inch or so.

Q. About an inch or so? A. Yes.

Q. Do you remember stating shortly after this

(Deposition of Jacob C. Gunderson.)

accident to Mr. Toland at San Francisco, that it was down about $1\frac{1}{2}$ an inch?

A. No, I don't remember just how much I said.

Q. Now, do you mean to tell me that these ratlins were rusted through, these $\frac{5}{8}$ of an inch iron or steel rods were rusted through between the shrouds?

A. Yes.

Q. Do you think that smoke would rust a rod of that size through? A. No.

Q. When you talk about burning out, do you mean to say that the smoke or the heat from the boiler may burn out the seizings?

A. Yes; that is, I didn't say they were burned off; I said they were either rusted or burned off.

Q. Either rusted or burned off? A. Yes.

Q. Was the condition of these ratlines as you saw them clearly to be seen by you when you went up the shrouds? A. Yes.

Q. Any sailor going up the shrouds would, if he had exercised ordinary care, have seen the condition that you have testified to? A. No.

Q. Why not?

A. If a man was up here and this breaks with him and this is open, and if he is there before I go up, if they are in this condition before I go up, I will naturally see them.

Q. You will naturally see them? A. Yes.

Q. Do you think any sailor would have any difficulty in seeing them? A. No.

Q. You think that any sailor that went up the

(Deposition of Jacob C. Gunderson.)

shrouds ought to have seen them if they were in that condition?

A. Well, it is a known fact that a man could see it when he goes [49] up there.

Q. Now, then, all of these ratlins excepting this one that you have mentioned were in their original position, that is, horizontal, were they not?

A. Yes, as far as I can remember. I can't remember whether any of the seizings were gone in particular or not; but this is what I paid particular attention to, that they were rusted off.

Q. I know, but I am not speaking about that now; I am asking as to whether you are testifying that any of them were other than in a horizontal position?

A. They were, as far as I can remember.

Q. They were horizontal? A. Yes.

Q. That is their natural position, isn't it?

A. Well, that is the natural position if the whole ratline was there.

Q. I understand that, but that is the natural position in which they are laid across the shrouds, in a horizontal position? A. Yes, sir.

Q. And that was the position in which you found them? A. Yes.

Further Redirect Examination.

Mr. THACHER.—Q. What do you mean, Mr. Gunderson, by being able to see the condition of the ratlins; do you mean to say you could see them if they were gone? A. Yes.

Q. Is that all you mean?

(Deposition of Jacob C. Gunderson.)

A. Yes; I could see if they are gone, if I go up there.

Q. In other words, you could see them just as you could see the spokes of a ladder gone in case they are not there? A. Yes.

Q. But you do not mean that you could tell whether it was going to break or not? A. No, no.

Mr. THACHER.—I will offer this drawing in evidence as “Libelant’s Exhibit 2.”

(The drawing is marked “Libelant’s Exhibit 2.”)

[50]

United States of America,
~~State of~~
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that in pursuance of the stipulation hereunto annexed, on February 13, 1915, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of T. A. Thacher, Esq., in the Merchants’ Exchange Building in the City and County of San Francisco, State of California, personally appeared Jacob C. Gunderson, a witness called on behalf of the libelant in the cause entitled in the caption hereof, and T. A. Thacher, Esq., appeared as proctor for the libelant and Ira A. Campbell, Esq., appeared as proctor for the respondents, and the said witness being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the said deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors the reading over of the deposition to the witness and the signing thereof was expressly waived.

Accompanying said deposition and annexed thereto and forming a part thereof are "Libelant's Exhibits 1" and *and* Claimants' Exhibit "A."

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the clerk of the United States District Court for the Northern District of California, for whom the same was taken.
[51]

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF I have hereunto set my hand at my office this 31st day of March, 1915.

[Seal] FRANCIS KRULL,
U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed May 14, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [52]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

(Before FRANCIS KRULL, U. S. Commissioner.)

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Claimants.

Deposition of Henry Anderson, for Libelant.

BE IT REMEMBERED, That on Saturday, May 8, 1915, pursuant to stipulation of counsel hereunto annexed, at the office of William Denman, Esq., in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Henry Anderson, a witness produced on behalf of the libelant.

T. A. Thacher, Esq., appeared as proctor for the libelant, and Ira A. Campbell, Esq., appeared as proctor for claimant, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(Deposition of Henry Anderson.)

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the libelant [53] at the office of William Denman, Esq., in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, on May 8, 1915, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by E. W. Lehner.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived. [54]

HENRY ANDERSON, called for the Libelant, sworn.

Mr. THACHER.—Q. Mr. Anderson, were you a sailor on the "Senator" at the time Hokanson was injured? A. Yes.

Q. How soon after he had fallen down did you see him? A. A couple of minutes.

Q. What did he say, if anything, as to the cause of his injury?

(Deposition of Henry Anderson.)

Mr. CAMPBELL.—I object to that as being hearsay.

A. I asked him how he happened to fall down, and he said the ratlin carried away.

Mr. THACHER.—Q. Where was he at the time he said this?

A. He was laying on the after hatch, No. 3 hatch.

Q. What was the condition of the ratlins and the shrouds of the mainmast?

Mr. CAMPBELL.—I object unless the witness is shown to have a knowledge of that.

A. I did not investigate it; I see from the deck that there was five, or six, or seven—I did not count them—on both sides, the ratlins were off in the middle.

Mr. THACHER.—Q. Off in the middle. You saw that from the deck? A. Yes.

Q. About how high up?

A. That was the upper ratlins.

Q. The upper ratlins? A. Yes.

Q. State whether or not you saw any hanging down.

A. Well, you know when they are off in the middle they are hanging down a little, just a little,—very little; you could just see the ends apart.

Q. Will you draw just how they were?

A. Not just—I could not say just how.

Q. Will you draw, not exactly how it was, but the way the shrouds looked?

A. Something like that; probably some of the ends did [55] not come quite together, and some the ends were a little passing by one another.

(Deposition of Henry Anderson.)

Q. Will you mark that A B? Where would the break be?

A. The break would be in the middle, exactly.

Q. So that A B would represent a ratlin?

A. Yes, sir.

Q. Then at C there would be a break? A. Yes.

Q. How many ratlins—

Mr. CAMPBELL.—Let the witness testify.

A. Five, or six, or seven, I did not count them.

Mr. THACHER.—Q. Where would the shrouds be on that picture?

A. The shrouds on each end of the ratlin.

Q. That is at what?

A. The shrouds would be at each end of the ratlin.

Q. Would there be some other shroud, too?

A. I don't remember if there was one in the middle; I am not sure of that, I don't remember, but I think there was; I think there was four shrouds, altogether; yes, I think so.

Q. You spoke of some being missing. Will you point out, mark on that about where they were, just in a general way? A. Ratlins missing?

Q. Yes, broken.

A. Well, that would be right up here, the upper ratlins; the ratlins go right up the mast; there is about one foot between each ratlin.

Q. Put an M there.

A. Right there; that is where the shrouds connect with the mast.

Q. Where would the seizings be here?

(Deposition of Henry Anderson.)

A. Each end, each shroud.

Q. At A and B? A. Yes.

Mr. THACHER.—I will offer this in evidence as “Libelant’s Exhibit 1, Anderson,” and this as “Libelant’s Exhibit 2, Anderson.”

(The documents were marked “Libelant’s Exhibit 1, Anderson,” and [56] “Libelant’s Exhibit 2, Anderson.”)

Cross-examination.

Mr. CAMPBELL.—Q. There was considerable discussion between you and the other sailors on the “Senator” immediately after this accident, as to how it was caused, was there not? A. Discussion, no.

Q. Was there not some talk? A. Not much.

Q. Was there any talk?

A. Hardly, we were just wondering how he happened to fall down.

Q. You could not agree as to how it took place, could you? A. No, we could not.

Mr. THACHER.—I make a motion to strike that out.

Mr. CAMPBELL.—Q. Do you remember signing a statement made before Mr. Towle, of the Pacific Coast Steamship Company?

A. Me signing it?

Q. Yes. A. Yes.

Q. Do you remember stating this in the statement, that since Hoganson fell there had been more or less conversation regarding it among his shipmates at that time, but there was never any agreement between the members of the crew as to how they thought he

(Deposition of Henry Anderson.)

met his injury, or the cause of it, some suggesting one reason for his fall and some another?

A. Yes, that is right; that is the way it happened.

Q. Do you remember signing that statement?

A. Yes.

Q. You did not go aloft to examine this rigging?

A. No.

Q. On this photograph marked "Libelant's Exhibit, Anderson 2," you say that the ratlins were where?

A. The ratlins would be from the upper part of the shrouds and down a little ways to about here (showing).

Q. The ratlins are on the shrouds, on the after-mast? A. Yes. [57]

Q. Where did you stand at the time of the fall?

A. I was standing alongside of the mast.

Q. Alongside of the mast? A. Yes.

Q. On this upper deck of the vessel?

A. On the upper deck, alongside of the mast.

Q. Not on top of the cabin, but on the main deck of the vessel? A. On the top of the cabin.

Q. On the top of the cabin? A. Yes.

Q. Does not the mast come down to the upper deck of the vessel?

A. Yes—the mast comes down to the lower deck of the vessel.

Q. Does it not come down to the deck of the vessel which I have marked A B? A. Yes.

Q. It was on that deck you were standing?

(Deposition of Henry Anderson.)

A. No, I was standing on the upper deck, on the boat deck.

Q. You were standing on the boat deck?

A. Yes.

Q. But the hatch on to which Hokanson fell was on the deck that I have marked A B? A. Yes.

Q. Standing on the boat deck, you say you looked aloft, did you? A. I looked aloft.

Q. You saw some of the ratlins in what kind of a condition, would you call it, a burned condition?

A. That is what the boatswain was up there investigating for.

Q. I am asking you about your opinion—in a burned condition, or what would you call the condition? A. I would call it burned condition.

Q. And the iron was what was burned?

A. Yes.

Q. Was it the seizing, or the iron?

A. The iron in the middle.

Q. Call that the mast and this the deck, your shrouds come down like that (illustrating)?

A. Yes.

Q. Your ratlins are across the shrouds?

A. Yes, that is it.

Q. As I have drawn them on this drawing?

A. Yes. [58]

Q. All the way down to the deck?

A. Yes, about two feet from the deck or three feet from the deck.

Q. I want to know if it is not a fact that these ratlins which you say were burned still extended across

(Deposition of Henry Anderson.)

in a horizontal condition when you looked at them?

A. Well, they extended in some condition, they were hanging down a little, just a little.

Q. How much?

A. I could not say how much they were hanging down; I was not up there; it was not much; it was hardly showing.

Q. You show me on this drawing I have made here, the lower part. A. I could not just do it.

Q. You can use your best efforts at it.

A. Something like that.

Q. The line that I have marked A B on this drawing would indicate about the way the ratlins were?

A. Yes.

Q. Is it a fact that the ratlins were bent down at all as I mark the line A C, we will say—were they bent down that much?

A. No, they were not that much, but they were bent a little.

Q. How much would you say the center sagged, an inch or two?

A. An inch—I could not swear to those things.

Q. Your best judgment, Mr. Anderson.

A. That is my best judgment.

Q. You think that the center of the ratlin was probably an inch, about an inch lower than the outer ends? A. I suppose so.

Q. How much of the ratlins was gone?

A. It is hard, standing on the deck, to see that.

Q. You said they were burned off, how much was gone?

(Deposition of Henry Anderson.)

A. It looked to be about half an inch, from the deck, something like that.

Q. Half an inch?

A. Yes; that is to say, an opening of half an inch.

Q. We will take the line that I am drawing, D to the line E, as representing one of these ratlins.

A. Yes.

Q. How much space was there between the inner ends of the ratlin, the ends that I have marked F G?

A. It looks about half an inch. [59]

Q. About half an inch?

A. Yes, you could hardly see it.

Q. That is, the distance between F and G representing the inner ends of the ratlins that were burned, there was about half an inch of ratline gone?

A. At the most, as I could make it out.

Q. Then, do I mark this correctly on this drawing "Half inch gone"—does that show it correctly?

A. Not correctly; I could not say correctly.

Q. According to your best judgment?

A. According to my best judgment, yes.

Q. Now, these ratlins that you saw from the deck that you think were in the condition that you have just described, were the ratlins that were immediately beneath the masthead?

A. Yes; the last ratlin ends about a foot from the top of the shroud—that is the last ratlin in the shroud.

Q. As I understood you to say, there were five or six ratlins from the top down which were in the condition which you have testified to? A. Yes.

(Deposition of Henry Anderson.)

Q. I will ask you what in your judgment is the seamanlike way for a man to go aloft, on shrouds and ratlins—what should he take hold of with his hands?

A. I was learned when I started to go to sea, to hold onto the shrouds, never hold onto the ratlins, with my hands.

Q. In your judgment as a seaman, would you consider it carelessness to take hold of the ratlins?

A. Yes.

Mr. CAMPBELL.—I offer this drawing in evidence as Claimant's Exhibit "A," Anderson.

(The document is marked "Claimant's Exhibit "A," Anderson.") [60]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of the stipulation hereunto annexed, on Saturday, May 8, 1915, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of William Denman, Esq., in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, personally appeared HENRY ANDERSON, a witness called on behalf of the libelant in the cause entitled in the caption hereof, and T. A. Thacher, Esq., appeared as proctor for the libelant, and Ira A. Campbell, Esq., appeared as proctor for the claimant, and that the said witness, being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth

in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the said deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors the reading over of the deposition to the witness and the signing thereof was expressly waived.

Introduced in connection with said deposition and referred to and specified therein, are Libelant's Exhibits 1 and 2, Anderson, and Claimant's Exhibit "A," Anderson.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken. [61]

And I do further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand at my office aforesaid, this 18th day of June, 1915.

FRANCIS KRULL, (Seal)

United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Jun. 18, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [62]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

(Before FRANCIS KRULL, U. S. Commissioner.)

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Claimants.

Deposition of C. J. Hannah, for Claimant.

BE IT REMEMBERED that on Saturday, May 29, 1915, pursuant to stipulation of counsel hereunto annexed, at the office of Messrs. McCutchen, Olney & Willard, in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., C. J. Hannah, a witness produced on behalf of the claimants.

T. A. Thacher, Esq., appeared as proctor for the libelant, and Ira A. Campbell, Esq., appeared as proctor for claimants, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(Deposition of C. J. Hannah.)

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the claimants at the office of Messrs. McCutchen, Olney & Willard in the Merchants Exchange Building in the City and County of [63] San Francisco, State of California, on May 29, 1915, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by E. W. Lehner.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [64]

C. J. HANNAH, called for the claimants, sworn.

Mr. CAMPBELL.—Q. What is your business?

A. Seaman.

Q. Master mariner? A. Master mariner.

Q. Were you master of the steamer "Senator" on the 10th day of December, 1913, at the time a seaman by the name of Hokanson was injured on board of the "Senator"? A. Yes.

(Deposition of C. J. Hannah.)

Q. Where was the "Senator" at the time of that accident?

A. Just outside of Cape Flattery.

Q. What was the first that you knew of the accident? A. The first officer told me.

Q. What did you do upon hearing of the accident?

A. I turned about and run for Neah Bay.

Q. Where is Neah Bay?

A. That is about 5 miles inside of Flattery, 4 or 5 miles.

Q. What is there at Neah Bay?

A. There is a Government Indian Reservation there, and life-saving station, and most always Government boat patrols outside there in winter time.

Q. The Government life-saving boat "Snohomish"? A. Yes.

Q. What did you do on board your vessel aside from turning back to Neah Bay upon hearing of the accident?

A. I turned around and went aft; he was on the after hatch and I talked with him; I had them put him on a bed, a couch, and put in social hall.

Q. Did you hold any conversation with Hokanson at that time? A. Yes.

Q. What, if anything, did he say as to how the accident occurred?

A. I asked him how it occurred and he said that he went up—the sail was caught and he went up to kick it down, and he swung around the rigging, and when he kicked the sail it started and he lost his hold; he did not have hold sufficient to hang on [65] be-

(Deposition of C. J. Hannah.)

cause it started so much easier than he thought it would.

Q. Did you have any communication with shore?

A. Wireless, that is all.

Q. What message did you send ashore?

A. I sent the message ashore that we were returning to Neah Bay and wanted medical attention; that we had a man fall from aloft who was badly hurt.

Q. You eventually arrived at Neah Bay?

A. Yes.

Q. What did you do after you got there?

A. We lowered one of the boats down to the rail and took him out and put him into this boat and lowered the boat down even with their boat, so it would not jar him, and they took him from our boat into the life-saving boat; the doctor came in and first examined him.

Q. The doctor from ashore?

A. Yes, he came aboard and examined him.

Q. Who brought the doctor out to the ship?

A. He came with the life-saving crew and went with them.

Q. Was there anything that you could have done for Hokanson, care of him while he was on board the vessel that you did not do? A. No.

Mr. THACHER.—I object to that as leading.

Mr. CAMPBELL.—Q. In your judgment, Captain, was there anything omitted to be done that could have been done for the man while he was on board your vessel? A. No.

(Deposition of C. J. Hannah.)

Q. State whether or not there was any delay in turning your vessel about and proceeding into Neah Bay. A. No delay whatever. [66]

Q. What did you do with your vessel after you had placed the man in the care of the vessel from ashore?

A. I hove up our anchor and started back.

Q. What, if anything, was to be done with Mr. Hokanson after he reached shore?

A. Well, I put him in their care, the doctor's care and the life-saving crew, and I asked them to send him to the hospital as soon as they could.

Q. What hospital do you refer to?

A. Port Townsend, the Marine Hospital.

Q. United States Marine Hospital? A. Yes.

Q. That is located where?

A. At Port Townsend.

Q. Neah Bay is in the State of Washington?

A. Yes.

Cross-examination.

Mr. THACHER.—Q. Captain, are you a seaman now? A. Yes.

Q. Master mariner? A. Yes.

Q. With what company are you?

A. Pacific Coast Steamship Company.

Q. How long have you been with the Pacific Coast Steamship Company? A. About 17 years.

Q. You have been with them about 17 years?

A. Yes.

Q. Now, Captain, what time did this accident occur?

(Deposition of C. J. Hannah.)

A. After lunch, somewhere between one and 2; I could not say just exactly the time.

Q. Was it not about 3 o'clock?

A. I don't think it was at late as 3 o'clock.

Q. Over before the shipping commissioner, at least in filing your log, I notice that you signed a statement that it happened about 3 o'clock, I suppose that was correct, was it not? A. 3 o'clock?

Q. 3 o'clock.

A. When the man fell from aloft?

Q. When the man fell from aloft? [67]

Mr. CAMPBELL.—Or when they reached Neah Bay.

Mr. THACHER.—The time of the accident?

A. I think you are mistaken; I don't think it was later than 2 o'clock.

Q. But if you did make an entry of that kind or sign an entry of that kind it would be correct, would it not?

A. Whatever was taken from the log-book was correct.

Q. If you entered upon the time in the log-book as 3 o'clock, it was correct?

A. Whatever is in the log-book is correct.

Q. So that at this time there is quite apt to be a difference of an hour or so—

A. — I would not say about that, but I know, of course, everything is put right in the log-book; there is an officer right there, and everything that occurs, that is put right down at the time in the log-book.

(Deposition of C. J. Hannah.)

Q. You would not sign it of course unless it was absolutely correct?

A. I would not sign it unless it was correct. But I think it was earlier than that.

Q. How long have you been on the "Senator," Captain?

A. At that time I had been only a couple of days.

Q. What boat had you come from?

A. On to her?

Q. Yes. A. The "City of Puebla."

Q. When did you come on board?

A. On the "Senator"?

Q. Yes.

A. I came on board—I don't just recollect the date.

Q. Two days before? A. Two days before.

Q. What had become of the old crew that had been on the "Senator"?

A. That I could not say. She had been laid up.

Q. Whereabouts was she laid up?

A. The first officer I think made the season on her; I would not be sure, but I think he was on her on the run to Nome. [68]

Q. She had been laid up quite awhile and then came on?

A. Ever since the Nome season she had been laid up; I am sure it was not a great while.

Q. Did you ever take the trip to Nome on her?

A. Yes, several of them.

Q. What kind of fuel do you burn on that boat?

A. Coal.

(Deposition of C. J. Hannah.)

Q. Where do you get at it? A. At Seattle.

Q. Now, Captain, where were you standing at the time of the accident?

A. At the time of the accident, I did not see the man fall, I was on the bridge.

Q. You were on the bridge?

A. I was on the bridge.

Q. Who told you about it?

A. The first officer.

Q. How did he happen to tell you about it?

A. I suppose as soon as he saw the man fall he told me of it.

Q. Where did he tell you of it, on the bridge?

A. On the bridge.

Q. Then what did you do?

A. I turned the ship around.

Q. You turned the ship around? A. Yes.

Q. And headed where?

A. Headed for Neah Bay.

Q. You did that as soon as the first officer told you?

A. Yes, as soon as he told me.

Q. What did he say?

A. He said a man fell from aloft and was very badly hurt.

Q. Then you turned her in from Neah Bay?

A. Yes.

Q. How did you happen to turn her in for Neah Bay?

A. Well, that is the nearest place for assistance.

Q. Had you ever been ashore there? A. No.

(Deposition of C. J. Hannah.)

Q. How did you know that it was the nearest place for assistance?

A. I knew by wireless—I sent a wireless to see if I could get a doctor.

Q. You sent a wireless to Neah Bay?

A. To Tatoosh and they telephoned up. [69]

Q. And you got an answer that there was a doctor?

A. Yes.

Q. Any kind of a doctor?

A. That is something I could not tell you, what kind of a doctor he was; he was the doctor there for the Government Reservation.

Q. When you went in there did you understand what kind of a doctor he was—you just heard there was a doctor?

A. Word came that he was the doctor from the Government Reservation.

Mr. CAMPBELL.—Q. On the Indian Reservation?

A. On the Indian Reservation, yes.

Mr. THACHER.—Q. How large a reservation is that?

A. That I could not say.

Q. It might be very small, might it not?

A. There is quite a number of houses, but outside of that I could not say; I could not say what the population was.

Q. Just a few Indian houses?

A. There is quite a place there; there are miners there too. It is quite a place, but how large it is I don't know.

(Deposition of C. J. Hannah.)

Q. I mean the reservation itself?

A. That I could not tell; I know nothing at all about it.

Q. So that you simply got word that there was a doctor from some Indian reservation who was there?

A. There was only the one from the Indian reservation.

Q. Yes, but you say you don't know a thing about the Indian reservation. I don't suppose you do?

A. No.

Q. All you know is there was—

Mr. CAMPBELL.—I suppose that is a matter of public record, the size of the Indian reservation.

Mr. THACHER.—Q. So when you got word that there was a doctor from some Indian Reservation you immediately put your boat into Neah Bay; is that right? [70]

A. I was running for there when I got the word.

Q. So you did not go out of your way at all?

A. Certainly I did not go out of my way; that is where I was heading for; if I could not get any attendance there I would have gone further.

Q. Now, Captain, it was a pretty good day, was it not? A. A pretty good day?

Q. Yes, that afternoon.

A. Well, it is according to what you call a good day; I do not call it very good; it was raining, nasty mist and rainy.

Q. Simply a good deal of mist?

A. Nasty wintry weather, a little rain at times.

(Deposition of C. J. Hannah.)

Q. Rather cool, chilly.

A. Well, it was regular wintry weather up there; it is not very warm or very cold. It was not freezing at all.

Q. You say the mate told you that the man was badly hurt? A. Yes.

Q. And so you directed the boat into Neah Bay?

A. Yes.

Q. Then you sent this wireless out—where did you send out this wireless from?

A. From the ship.

Q. But I mean what part of the ship?

A. I sent it from the wireless room.

Q. That is up forward, isn't it?

A. No, it is aft.

Q. You sent the message back?

A. I sent the message back to the wireless room.

Q. You stayed up there on the bridge for at least half an hour, didn't you?

A. I was on the bridge most of the time, I did not stay there all the time.

Q. You were on the bridge most of the time?

A. Yes, most of the time.

Q. When you headed her for Neah Bay you stayed there right along? A. On the bridge? [71]

Q. Yes.

A. Didn't I tell you awhile ago I went aft and talked to the man on the hatch? I could not be down and talking to the man and be on the bridge too.

Q. I fully realize that, Captain, but I was trying to get at the length of time you stayed on the bridge.

(Deposition of C. J. Hannah.)

You stayed on the bridge quite a little time before you went aft?

A. I stayed on the bridge until I got turned around and straightened out and headed for Flattery.

Q. You stayed on the bridge until you sent this wireless, didn't you?

A. No. I sent the wireless afterwards, when I got her turned around and went and talked to the man on the after hatch.

Q. How long did it take you to turn the vessel around and get her straightened out?

A. I could not say; perhaps it might have been 5 minutes and perhaps it might have been 10 minutes; it could not be longer than 10 minutes; we turn around in 3 or 4 minutes.

Q. Where was Mr. Hokanson lying?

A. On the after hatch.

Q. When you say him how was he lying on the floor—I mean to say was he propped up at all, anything of that kind?

A. Of course he had something underneath his head; he was not propped up that I know of.

Q. You could see that he was in very serious pain?

A. I could see he was in pain—the man was in pain.

Q. And the most severe pain?

A. Very severe pain, no doubt about that.

Q. When you came aft what was the first thing that you said?

A. Well, now, I don't just remember the first thing; I remember the conversation, I don't remem-

(Deposition of C. J. Hannah.)

ber the first thing that I said to him.

Q. You don't remember the first thing that was said? [72]

A. I can't say that I remember the first thing; I remember what the conversation was.

Q. Who was there at the time?

A. The first officer and myself and some of the sailors.

Q. The sailors, I suppose, were the men who had arranged him and put props under his head and so forth?

A. I could not say who did it, I don't know.

Q. Was he talking when you came up?

A. Oh, yes.

Q. And he had been talking?

A. I don't know what he had been doing.

Q. He talked to you?

A. He talked to me. I asked him some questions and he answered.

Q. Did he say that when he got up and kicked the sail the first time that it fell down?

A. He said when he kicked it it fell.

Q. When he kicked it it fell?

A. It started and he went with it; he did not have hold enough to hold on.

Q. So according to this story he went up and the first kick he took the sail fell down?

A. I think the first kick, no doubt, because he said he could not kick it the second time because it was caught and the least thing started it.

Q. So it practically was not caught at all?

(Deposition of C. J. Hannah.)

A. It was caught enough to hold it up there.

Q. But he said that the sail was very little stuck?

A. Very little stuck, if that is the way you want to put it, very little stuck.

Q. So that when he just gave it a first kick it fell; is that right? A. That is right.

Q. That is what he said, is it?

A. Yes; he did not say the first kick—no first to it; he said the minute he kicked it it started. [73]

Q. And he said when he kicked it it fell?

A. Yes.

Q. And that is all he said to you about it?

A. Yes, that is all he said, that he fell.

Q. Then, as I understand it, his conversation was, at least that part of it that you have testified to, that when he kicked the sail he fell?

A. I asked him if anything gave way and he said no; he swung around the rigging and when he kicked the sail it started and he fell.

Redirect Examination.

Mr. CAMPBELL.—Q. At that time did he say anything about losing his hold?

A. Yes, he had lost his hold.

Q. How far is it from Neah Bay to Port Townsend?

A. It is over 70 miles—I can tell you—it is 81 miles.

Q. Where was the ship in respect to Cape Flattery at the time of the accident?

A. It was outside of Cape Flattery.

Q. But whereabouts outside?

(Deposition of C. J. Hannah.)

A. I should judge about 3 or 4 miles outside, southward of Cape Flattery.

Q. On her course to San Francisco?

A. Yes. [74]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of the stipulation hereunto annexed, on Saturday, May 29, 1915, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of Messrs. McCutchen, Olney & Willard, in the Merchants' Exchange Building in the City and County of San Francisco, State of California, personally appeared C. J. Hannah, a witness called on behalf of the claimants in the cause entitled in the caption hereof, and T. A. Thacher, Esq., appeared as proctor for the libelant, and Ira A. Campbell, Esq., appeared as proctor for the claimants, and that the said witness, being by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the said deposition was then and there taken down in shorthand notes by E. W. Lerner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties the reading over of the deposition to the witness and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the [75] cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand at my office aforesaid, this 18th day of June, 1915.

FRANCIS KRULL, (Seal)
United States Commissioner, Northern District of
California, at San Francisco.

[Endorsed]: Filed Jun. 18, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [76]

*In the United States District Court for the North-
ern District of California, First Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Stipulation for Deposition and Deposition of P. I. Carter, for Respondent.

IT IS HEREBY STIPULATED by and between the parties hereto that the deposition of P. I. Carter, a witness offered on behalf of respondents, may be taken before T. W. Holman, a notary public in and for the County of Jefferson, State of Washington, residing at Port Townsend, said county and state, upon the interrogatories hereunto annexed; and that the answers thereto may be taken down in long-hand or in shorthand and transcribed under the direction of the aforesaid officer taking the same; and that said deposition, when so taken and transcribed and signed by the witness and certified by the said officer taking the same, shall be returned to said United States District Court for the Northern District of California, at San Francisco, California, by registered mail, and may be read in evidence by either party. No objections to answers or to form of answers shall be waived.

AND IT IS FURTHER STIPULATED that said interrogatories and the answers thereto of the said witness so taken shall be deemed testimony given at the said trial and may be read, if either party be so advised, whether or not the method of taking the same shall comply with the provisions of the statute in such cases made and provided for the taking of depositions. [77]

Dated at San Francisco, California, June 14th,
1915.

DENMAN & ARNOLD,
Proctors for Libelant.
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondents. [78]

*In the United States District Court for the North-
ern District of California, First Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

**Direct Interrogatories to be Propounded to P. I.
Carter.**

1. What is your profession?
2. How long have you been engaged in practice
as a licensed physician and surgeon?
3. What, if any, connection did you have on and
after the 10th day of December, 1913, with the
United States Marine Hospital at Port Townsend,
Washington?
4. Are you still connected with the United States
Marine Hospital service at Port Townsend?
5. How long have you been in that service?
6. Did you at any time after December 10, 1913,

receive into your care as a physician and surgeon at the United States Marine Hospital at Port Townsend, Washington, one A. Hokanson who was injured while acting as a sailor on board the steamship "Senator"?

7. How was Hokanson brought to Port Townsend, if you know?

8. What was the condition of the man at the time he was received into the hospital?

9. Were any services rendered to him by you as a physician and surgeon of the United States Marine Hospital service?

10. If so, what services were so rendered?

11. What treatments were given or operations performed upon said Hokanson? [79]

12. How long did said Hokanson remain at the United States Marine Hospital at Port Townsend, Washington?

13. Under whose care as a physician and surgeon was he during his stay at said hospital?

14. How did he come to be discharged from the hospital?

15. When did he leave the hospital?

16. Where did he go, if you know, upon leaving the hospital?

17. What was the date that he left the hospital?

18. What was Hokanson's condition when he left the hospital?

19. Were any charges made to Hokanson or to the Pacific Coast Company or to the Pacific Coast Steamship Company for the services rendered Ho-

kanson at said United States Marine Hospital?

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondents. [80]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and

PACIFIC COAST STEAMSHIP COM-

PANY, a Corporation,

Respondents.

**Cross-interrogatories to be Propounded to P. I.
Carter.**

1. Have you finished answering all the direct inter-
rogatories propounded to you?

2. When did you first learn what was contained
in all or any part of the interrogatories? State as
nearly as possible the exact time.

3. How did you learn what was in them or in part
of them?

4. Who showed them to you?

5. Have you conferred with anyone regarding
these interrogatories?

6. If so, with whom?

7. When?

8. What did he say? If more than one, what did
each of them say?

9. What did you say?
 10. Have you received any writing from anyone regarding these interrogatories?
 11. If so, attach copies of all said writings to these interrogatories.
 12. What time is it?
 13. What time did you answer your first direct interrogatory? [81]
-

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

**Answer to Direct Interrogatories Propounded to P.
I. Carter.**

Answer to
Question
Numbered:

1. Physician and surgeon.
2. Since June, 1907, continuously.
3. A. A. Surgeon, United States Public Health Service on duty at Marine Hospital, Port Townsend, Washington.
4. I am.
5. Since the fall of 1907.
6. I was one of the physicians who received him

into care at that place; whether or not he was injured on the steamship "Senator" is a matter of report only to me.

7. He was brought there on the U. S. Rev. Cutter "Snohomish."

8. Fracture of the middle third of the right femur; deep bruise of right hip and side; tenderness on deep pressure across abdomen; bruise of calf of left leg; right knee and ankle swollen and tender, small deep wound in thigh, right thigh.

9. Yes.

10. Dr. Earle, of the same service, and I dressed all wounds and applied proper dressings to leg.

11. "Buck's Extension" was applied to the leg and wounds were thoroughly cleansed and dressed.

12. From December 11th, 1913, to May the 5th, 1914.

13. Dr. B. H. Earle and I. [82]

14. At his own request.

15. May the 5th, 1914.

16. I don't know; I heard that he was taken to San Francisco.

17. May the 5th, 1914.

18. His condition was greatly improved, but there was not complete bone union of the fracture.

19. No charges.

P. I. CARTER,

Witness.

**Answer to Cross-interrogatories Propounded to P. I.
Carter.**

1. Yes.

2. Immediately on beginning to answer the direct

examination, about fourteen or fifteen minutes ago, I should say.

3. The commissioner, T. W. Holman, read them to me for answer after having sworn me to testify truly.

4. They have not yet been shown, but have been read to me by the commissioner T. W. Holman.

5. No.

6. No one.

7. Nothing.

8. Nothing.

9. Nothing.

10. None at all.

11. None to attach.

12. Two minutes of ten A. M., June 19th, A. D. 1915, at Port Townsend, Jefferson County, Washington, before Commissioner T. W. Holman.

13. About twenty-five minutes of ten A. M., June 19th, A. D. 1915, at Port Townsend, Jefferson County, Washington, before above stated Commissioner examining me.

P. I. CARTER,

Witness. [83]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Certificate Regarding Deposition of P. I. Carter.

State of Washington,
County of Jefferson,—ss.

I, Tom W. Holman, the undersigned notary public in and for the State of Washington, duly commissioned and sworn, do hereby certify that pursuant to the stipulation in the above-entitled matter in the above-stated court providing that the deposition of P. I. Carter of Port Townsend, Jefferson County, Washington, be taken before me upon the interrogatories thereunto annexed, which stipulation with said interrogatories is hereunto attached,—I did on the 19th day of June, A. D. 1915, at my office in Suite 1 & 2, Tucker Building, in the City of Port Townsend, Jefferson County, Washington, after summoning the said P. I. Carter to attend before me and after payment to him on demand of one day's witness fees, \$2 and mileage, 2 miles @ 10¢, as provided for by statute in this State, receipt for which pay-

ment is also hereunto attached, duly swear the said P. I. Carter to tell the truth, the whole truth and nothing but the truth concerning all interrogatories annexed and to be answered; that thereupon each direct interrogatory, as stated in the foregoing attached interrogatories, was read to him and his answer thereupon taken down in longhand by me and transcribed under my direction and by me personally, and in like manner each cross-interrogatory, as stated in the foregoing and attached cross-interrogatories, [84] was read to him and his answer thereupon taken down in longhand by me and transcribed under my direction by me personally; that after the said answers had been fully given by the said witness P. I. Carter, each interrogatory with its answer was read to him, and upon his declaring that there are no mistakes or omissions I caused him to subscribe his name to and at the end of each the answers to said interrogatories and said cross-interrogatories, and that thereupon I thereunto attached this certificate and in such form herewith submit the same to the above-stated Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 19th day of June, A. D. 1915, at Port Townsend, Jefferson County, Washington.

[Seal]

TOM W. HOLMAN,

Notary Public in and for the State of Washington,
Residing at Port Townsend in said County of
Jefferson.

COSTS AND CHARGES OF DEPOSITION:

One day's witness fee to witness P. I.

Carter, @ \$2.00 provided by statute in Washington for attendance on State Court, and mileage, 2 miles @ 10¢ likewise so provided, as per attached receipt.....\$ 2.20

Commissioner's charges for summoning witness, administering oath and conducting examination 7.50

Cost of having testimony reduced to typewritten form and of the above certificate, @ 20¢ per folio..... .80

(Seal) Total.....\$10.50

Postage of mailing registered as per stipulation, see cover on envelope addressed to clerk for amount.... .16

Total cost.....\$10.66

TOM W. HOLMAN,

Attorney and Counselor at Law, Port Townsend, Washington.

June 19th, 1915.

Received of Tom W. Holman the sum of two dollars and twenty [85] cents (\$2.20) for 1 day's witness fees and 2 miles at 10¢ before Tom W. Holman in attached matter.

[Seal]

P. I. CARTER.

[Endorsed]: Opened by order court and filed Sep. 11, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [86]

Deposition, etc. of C. L. Woods, for Respondents.**W. W. WASHBURN AND SON****Post Traders****Dealers in all Kinds of Fresh Fish, Indian
Baskets and Curios.****Neah Bay, Wash., ——— 191—.**

Personally appeared before me this 21st day of June, 1915, Dr. C. L. Woods, who upon oath says that the answers given by him to the foregoing questions are correct and true to the best of his knowledge and belief.

[Seal]

Dr. C. L. WOODS.

Subscribed and sworn to before me this 21st day of June, 1915.

W. W. WASHBURN, Jr.,**Neah Bay, Wash. [87]**

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,773.**AXEL HOKANSON,****Libelant,****vs.****PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,****Respondents.****Stipulation for Deposition.****IT IS HEREBY STIPULATED by and between**

(Deposition of C. L. Woods.)

the parties hereto that the deposition of C. L. Woods, a witness offered on behalf of respondents, may be taken before W. W. Washburn, Jr., a notary public in and for the County of Clallam, State of Washington, residing at Neah Bay, said county and state, upon the interrogatories hereunto annexed; and that the answers thereto may be taken down in longhand or in shorthand and transcribed under the directions of the aforesaid officer taking the same; and that said deposition, when so taken and transcribed and signed by the witness and certified by the said officer taking the same, shall be returned to said United States District Court for the Northern District of California, at San Francisco, California, by registered mail, and may be read in evidence by either party. No objections to answers or form of answers shall be waived.

AND IT IS FURTHER STIPULATED that said interrogatories and the answers thereto of the said witnesses so taken shall be deemed testimony given at the said trial, and may be read, if either party be so advised, whether or not the method of taking the same shall comply with the provisions of the statute in such cases [88] made and provided for the taking of depositions.

Dated at San Francisco, Cal., June 14th, 1915.

DENMAN & ARNOLD,

Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondents. [89]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

**Direct Interrogatories to be Propounded to C. L.
Woods.**

1. What is your profession? Supt. and Physi-
cian, Indian Agency.

2. How long have you been a licensed and prac-
ticing physician and surgeon? Since 1894.

3. Where were you living on or about the 10th
day of December, 1913? Neah Bay, Washington.

4. If you have stated that you were residing at
Neah Bay, Washington, state whether or not you
were there practicing your profession as a physician
and surgeon. Yes.

5. State whether or not, as a physician and sur-
geon, you were connected with any government ser-
vice. Yes, Indian service.

6. If so, what service and what was your connec-
tion with the same? U. S. Indian service, as supt.
and physician.

7. State whether or not on or about said 10th day

of December, 1913, you received into your care an injured man from the steamship "Senator." Yes.

8. If so, what was the name of such injured man?

A. Hokanson.

9. What were the first advices received by you that an injured man was being brought to the Port of Neah Bay by the steamship "Senator"? By a telegram from Tatoosh Island.

10. From whom did you receive such advices? From telegraph operator. [90]

11. Did you proceed out to the steamship "Senator"? Yes.

12. If so, where did you meet her? At the entrance to Neah Bay.

13. Who took you out? The life-saving crew.

14. Did you receive the injured man into your care? Yes.

15. If so, when and how? At above-named date, from officers of steamer.

16. How was the injured man brought ashore from the steamship "Senator"? On the life-saving boat.

17. From what injuries was the man suffering? Broken femur.

18. What treatment and services, if any, did you give to the man after he came under your care and attention? Temporary dressing aboard steamer, ashore, anaesthetic and reduction of fracture, and fixation with splint.

19. Where did you care for him? At the life-saving station.

20. How long did you keep him under your care and attention at Neah Bay? Until put aboard the life-saving tug "Snohomish" the same day.

21. What became of the man? Taken to Marine Hospital, Port Townsend.

22. If you say that you sent him away, state the place to which you sent him and the means by which he was sent. To Port Townsend, Wash., by steamer "Snohomish."

23. If you say that he was sent by the steamer "Snohomish," state what that vessel was and in what service she was engaged and where she was stationed. U. S. Revenue Cutter Service, life-saving tug and revenue cutter, stationed at Neah Bay.

24. What was the condition of the injured man during the time that you had him under your care and attention? Nervous, result of shock otherwise apparently healthy.

25. State whether or not in your judgment as a physician and surgeon anything else could have been done for him, other than that [91] which you did, while he was in your care? No.

McCUTCHEN, OLNEY & WILLARD.

Proctors for Respondents. [92]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSEN,

Libellant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

**Cross-interrogatories to be Propounded to C. L.
Woods.**

1. Have you finished answering all the direct inter-
rogatories propounded to you? Yes.

2. When did you first learn what was contained
in all or any part of the interrogatories? State as
nearly as possible the exact time. June 21st, 1915.
8:15 P. M.

3. How did you learn what was in them or in part
of them? By them being read to me.

4. Who showed them to you? No one.

5. Have you conferred with anyone regarding
these interrogatories? No.

6. If so, with whom? No one.

7. When? ———

8. What did he say? If more than one, what did
each of them say? ———

9. What did you say? ———

10. Have you received any writing from anyone regarding these interrogatories? No.

11. If so, attach copies of all said writings to these interrogatories.

12. What time is it? 8:27 P. M.

13. What time did you answer your first direct interrogatory? About 8:15 P. M. or 8:16 P. M.

[Endorsed]: Opened by order Court and filed Sep. 11, 1915.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [93]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

Before Hon. MAURICE T. DOOLING, Judge.

No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

WEDNESDAY, SEPTEMBER 22, 1915.

COUNSEL APPEARING:

For the Libelant: T. A. THACHER, Esq.,

For the Respondents: F. P. GRIFFITHS, Esq.

Mr. THACHER.—This is a libel *in personam*,

your Honor, brought against the Pacific Coast Steamship Company and the Pacific Coast Company, for injuries to a seaman on the 10th of December, 1913. Between the libel and the answer, many of the facts are admitted, and those facts I shall call your attention to.

It is admitted that the Pacific Coast Company is a New Jersey corporation; that the Pacific Coast Steamship Company is a California corporation; that on or about December 10, 1913, the libelant, that is, Hokanson, was hired by the Pacific Coast Steamship Company to perform services as a seaman on the steamship "Senator," which is agreed under the pleadings to be operated and controlled [94] by the Pacific Coast Steamship Company; that on December 10th of that year, the "Senator" left Victoria, British Columbia, on a voyage to San Francisco; that pursuant to the employment, the libelant Hokanson, was on board the "Senator," acting as seaman; that the mainsail of the "Senator" was up when the steamer left Victoria; that in the afternoon, when the steamer was on the high seas off Cape Flattery, that is, down near the heads leading to the Pacific Ocean, the boatswain of the steamer, who was employed by the Pacific Coast Steamship Company, and who was commanding the libelant, was superintending the lowering of the mainsail; it is agreed that the sail refused to come down; it is further agreed that the libelant climbed the shrouds, the ratlins on which are admitted to be 12 inches apart; that is to say, it is admitted he climbed up ratlins about 12 inches apart,

which traversed the shrouds horizontally, forming the steps of a ladder for going aloft; it is admitted that he climbed the shrouds, using the steps as aforesaid, and that he fell down and suffered severe injuries;

The first allegation of the defense, that is, so far as it appears from the answer, is that the libellant Hokanson climbed the shrouds voluntarily, without any orders whatsoever to do so, and that when he reached a position near the eyes of the rigging, some 40 feet up from the deck, he stood on the sail. The sail, it is admitted by the pleadings, stuck; as a matter of fact, the sail was furled on the mainmast of this ship "Senator" and it was desired to get it up. The answer sets out that the libellant, in attempting to loosen said sail by going aloft on the shrouds and ratlins of said steamer, by removing both feet from the ratlins—as I say, the ratlins are these cross beams, like rungs of a ladder—and by holding onto one of said shrouds with one [95] hand only and swinging himself bodily away from said shroud and said ratlins, and jumping on said trysail, as aforesaid, assumed the risk incident to such employment. That is to say, the answer sets out that when the libellant reached a point at which he was going to free the sail, that he used one hand to hold onto the shroud and then he jumped on the sail, jumped over on the sail that he was trying to loosen with both feet; he was trying to bring the sail down, and the sail gave way. We shall show that he did not do this, and moreover, a reading of the pleading shows that a man who would jump on a sail 40 feet above the deck in

an attempt to lower it, holding on with one hand, would be practically inviting suicide; the very thing that he was trying to do, that is, the lowering of the sail, would be what would cause him to fall; we shall show your Honor that the "Senator" was a ship which had been employed in the Nome trade, running from Seattle to Nome during the summer of 1913; that it had been laid up; that the libelant went north on the steamer "President" and was transferred over from the "President" to the "Senator"; that when they went on the "Senator" they had every reason to believe the ship was in first-rate shape; that the first day after leaving Victoria, the libelant was ordered up by the boatswain because the sail stuck, because it refused to come down; that he went up in pursuance to orders; that after first attempting to loosen the sail from the outside of the shrouds, he climbed around to the inside of the shrouds, a perfectly seamanlike performance, because they always work on both sides of the shrouds, and that he touched it, or gave a slight kick to the sail, that being the only way he could reach it; that he had hold of the shrouds with both hands; that at the moment he kicked the sail, the ratlin on which he was standing gave way, broke, and that as a result of [96] that he fell down to the deck; that after falling down to the deck he made known what had happened, in the way that the ratlin had carried away, that being really a part of the accident which is the whole essence of this complaint; that as a result of this accident, he was taken to Port Townsend Hospital, where he stayed from December to May, in great suffering;

(Deposition of C. L. Woods.)

that he then returned to San Francisco and after a day or two in the hospital was taken home; that again in July he went to the hospital and was re-operated on; that he left the hospital again in October; that he is a permanent cripple as a result of this injury, and unfitted to earn any real compensation whatever, and that the whole matter was a result of sending out a ship that should have been seaworthy, from Seattle, in an absolutely unfit condition, in a condition where the rigging was poor; apparently, it had not been inspected; and that as a result of this failure of operation of the ship, the accident happened, and the man was doomed to great suffering and injury. In this connection I will read from a few depositions which I shall offer, because I should like to have your Honor obtain a complete understanding of this case at the end of the trial, and not simply wait for briefs which ultimately turn up. I wish to call your Honor's attention to what has been said in the depositions. I will first read from the deposition of a sailor named Jacob C. Gunderson.

“Q. Mr. Gunderson, what voyages did you take on the ‘Senator’ in December, 1913?

A. From Seattle to San Francisco—is that what you mean?

Q. Yes. A. From Seattle to San Francisco.

Q. You say you took a voyage? A. Yes.

Q. When did you take your first voyage?

A. The first was— I joined her on the 8th of December. [97]

(Deposition of C. L. Woods.)

Q. Was Mr. Hokanson a seaman at that time?

A. Yes.

Q. What was your capacity? A. Seaman.

Q. On that first voyage, when the 'Senator' was off Cape Flattery, what was done with the mainsail?

A. They were trying to lower it down.

Q. What did Hokanson do?

A. He went up aloft to see whether he could get it down or not, because we were unable to get it down from the deck.

Q. How did he happen to do this?

A. Well, being unable to get the sail down from the deck, he was told by the boatswain to go up and see what was wrong with it. Is that what you mean?

Q. Yes, how he happened to go up.

A. He went up at the boatswain's order.

Q. Did you hear him give Mr. Hokanson this order? A. Yes.

Q. What did he say?

A. He said, 'Go up to see what is the matter with it, Al.'

Q. Did you see Hokanson after he got aloft?

A. Yes.

Q. What side was he on?

A. He was on the port side.

Q. What was he doing when you saw him aloft?

A. Well, I saw him standing up there; I did not see him doing anything in particular at that time, because I went around on the other side and tried to pull on it.

Q. How far up was he?

(Deposition of C. L. Woods.)

A. He was right up to the upper ratlins.

Q. Did he have hold of anything?

A. He had hold of something when I saw him, standing in the rigging, he had hold with one hand.

Q. What did he have hold of?

A. Well, I can't remember; I didn't take any particular notice of that, but I saw he had his hand extended a little, or raised up a little; I supposed he had hold of the shroud or some tackle, I don't know what it was." [98] Then he drew a picture, which is among the papers. That, your Honor, gives an idea of the testimony which is taken on deposition. I think I will read from Mr. Anderson's testimony, also.

Mr. GRIFFITHS.—Your Honor, can the entire deposition be considered in evidence?

Mr. THACHER.—I will offer this deposition of Jacob C. Gunderson and S. A. Peterson, and of Henry Anderson. I shall also read from the deposition of another sailor, Henry Anderson, which will bring out quite similar evidence, and to some extent throw some light upon the facts. In this deposition there is a picture of the "Senator," which is here as an exhibit. I offer that as Libelant's Exhibit 1.

Mr. GRIFFITHS.—When was that picture taken, Mr. Thacher?

Mr. THACHER.—I don't know; I think it was taken about seven or eight months ago. I will call as my first witness Mr. Martin.

Testimony of Robert Martin, for Libellant.

ROBERT MARTIN, called for the libellant, sworn.

Mr. THACHER.—Q. Mr. Martin, what is your occupation? A. Seaman.

Q. What boat are you on?

A. On the steamer "Queen."

Q. What was your occupation in December, 1913?

A. I was deck boy on the "Senator."

Q. You remember the day that Mr. Hokanson fell down? A. Not exactly.

Q. I do not mean the exact date; I mean to say you remember that Mr. Hokanson did fall down?

A. Yes.

Q. Do you remember the sail being up?

A. Yes.

Q. Will you explain, as fully as you can, to the Court anything you know about how Mr. Hokanson happened to go up to free the sail— [99] was the sail stuck?

A. Yes. Mr. Hokanson was sent aloft.

Q. Who sent him aloft? A. The boatswain.

Q. Did you hear the boatswain give the order?

A. Yes, I did.

Q. What did the boatswain say?

A. He says, "Axel, go aloft and clear the sail."

Q. "Go aloft and clear the sail"? A. Yes.

Q. Where were you standing then?

A. I was engaged in cleaning the scupper blocked with coal dust, with small pieces of coal on the starboard side of the mainmast.

(Testimony of Robert Martin.)

Q. Who else was near you?

A. Mr. Gunderson, the boatswain, and a winch driver.

Q. Who was the winch driver?

A. Heine, they called him; that is the only name I knew him by.

Q. Do you remember whether or not it was Anderson? A. Anderson, yes.

Mr. GRIFFITHS.—Q. Do you know that that is his name? A. I am not positive now.

Mr. THACHER.—Q. Who was working on the sail? A. Mr. Hokanson.

Q. How was the sail set, I mean to say, how did it look from the deck?

A. It was all bunched up like, behind the mainmast, and it was up to the upper part of the rigging.

Q. What was the next that you heard or saw thereafter, after Hokanson had gone up?

A. I went over and helped them, Gunderson and Anderson and the boatswain.

Q. What were you all doing?

A. We were standing at the lower part of the sail, hanging onto it, trying to give a hand to haul it down.

Q. You were hanging onto the sail, itself?

A. Yes, the lower part of it. [100]

Q. Then what happened?

A. The sail came down all at once; Gunderson stumbled to one side, and just then I looked up and seen Mr. Hokanson was falling.

Q. Did he strike anything on the way down?

(Testimony of Robert Martin.)

A. Not that I know of.

Q. Where did he fall to?

A. He fell to the hatch, No. 3 hatch.

Q. What was his condition when you saw him after he had fallen?

A. He was lying there on the port side of the boom; he seemed unable to move.

Q. Was he groaning? A. Yes.

Q. What did you hear him say, if anything?

A. Why, at the time the captain was there he told him that everything was rotten aloft.

Q. Mr. Martin, did you ever see anything which had any appearance of having fallen down from the rigging after that accident?

A. Yes; about seven o'clock the next morning, between six and seven, we were washing down the decks, and I picked up a small piece of sort of bunting that was under the seizing, between the wire and the seizing; the shrouds and the seizing.

Q. Where did you pick it up?

A. On the port side of the same rigging that Mr. Hokanson went aloft on.

Q. How was it in regard to the position—you say it was on the port side—how close was it to the shrouds Mr. Hokanson had been up on?

A. Well, there is a sort of gangway there to the hatch; it was on the forward part; it was right near the rigging, about three feet away.

Q. Now, looking at this photograph here, where, approximately, did you pick this up?

A. You can't see the port side there.

(Testimony of Robert Martin.)

Q. It was under where?

A. On the other side, on this section here; you see, opposite from here, where that line comes down, on the other side. [101]

Q. I will ask you a leading question: Was it at a place where it might have fallen from where Mr. Hokanson was standing? A. Yes.

Q. Will you describe what that piece of bunting was; I mean to say, how it looked, how large it was, and whether it had any marks on it?

A. Well, it was somewheres about two inches square.

Q. What was it made of?

A. An ordinary gunny-sack.

Q. Was there any tar about it, or anything that suggested the rigging to you in that?

A. It had an impression of the shroud.

Q. It had an impression of the shroud?

A. Yes.

Q. Had you ever seen anything like it before?

A. No, I had not.

Q. You had not ever picked up a similar piece of gunny-sack? A. No.

Q. What was the condition of the ratlins as you could see them?

Mr. GRIFFITHS.—I object to the question unless it is shown that he had observed the ratlins and noted them.

Mr. THACHER.—Q. State whether or not you looked up at the ratlins after Mr. Hokanson had fallen? A. Yes,

(Testimony of Robert Martin.)

Q. What was their condition?

A. I seen there were three of them that were missing in the middle, between the two middle shrouds—between the two middle shrouds there was no ratlin at all.

Q. On what side of the mainmast was that?

A. The port side.

Q. About where on the port side?

A. It was right near the top of the rigging.

Cross-examination.

Mr. GRIFFITHS.—Q. You say that you saw three ratlins missing, Mr. Martin? A. Yes.

Q. That was perfectly easy for you to see from the deck, was it? A. Yes.

Q. Did you pick up any ratlins around on the deck afterwards? You spoke of a piece of bunting. Did you pick up a ratlin? [102]

A. No, no ratlins, a piece of bunting.

Q. Just a piece of bunting? A. Yes.

Q. What are the ratlins made of, do you know?

A. I don't know nothing about the top ratlins, but the lower ones are made out of a sort of iron pipe, or a solid piece of iron, some of them.

Q. Made of iron, are they? A. Yes.

Mr. THACHER.—Q. What became of that piece of bunting that you had?

A. Why, I left the steamer the trip after that, and I came to San Francisco, and I made a round trip up to Victoria, and I left the steamer there, and I left that also on board.

(Testimony of Robert Martin.)

Mr. GRIFFITHS.—If your Honor please, I have two witnesses here, and Mr. Thacher has kindly consented that I may put them on instead of keeping them.

Testimony of W. H. Banks, for Respondent.

W. H. BANKS, called for the Respondent, Sworn.

Mr. GRIFFITHS.—Q. You are a practicing physician and surgeon here in San Francisco, are you?

A. Yes, I am.

Q. What institution are you a graduate of?

A. Cooper.

Q. Cooper medical college? A. Yes.

Q. Are you the physician and surgeon of the Pacific Coast Steamship Company? A. I am.

Q. Did Mr. Hokanson, whom you saw in court here, come under your attention at some time during the year 1914? A. He did.

Q. At what time?

A. I saw him first on May 9th.

Q. Under what circumstances, Doctor?

A. He was at the marine hospital with a fracture of the thigh.

Q. At whose instructions did you go to see him?

A. Mr. Barry.

Q. Who was Mr. Barry?

A. Mr. F. M. Barry is the claims agent of [103] the Pacific Coast Steamship Company.

Q. What instructions did you have from Mr. Barry, if any, with regard to this man or the care, if any, which you should show him?

(Testimony of W. H. Banks.)

A. He wanted me to examine the case and report conditions.

Q. What conditions did you find?

A. I found what had evidently been a fracture of—I believe, I do not recall right now, the right or left leg—I cannot recall on the spur of the moment—the right thigh.

Q. Was fractured? A. Yes.

Q. What did you do for Mr. Hokanson, if anything?

A. I reported the conditions, as I found them, to the company, and was asked to advise them, and I advised them that under the circumstances I thought it would be better for Mr. Hokanson to take a few weeks at home, in other words, to recuperate, to see if there might not be a more firm union of the fractured bone.

Q. I take it from what you have said that at that time there was not a firm union: Is that correct?

A. There was a partial union, but not complete.

Q. Did Mr. Hokanson take a rest to recuperate for that period of time, for a number of weeks?

A. He did.

Q. What did you advise at the end of that time, if anything?

A. I saw him again on June 1st, 1914, at his home in Berkeley, and inasmuch as there was not much more firmness to the union of the bone, I advised that he had better go back to the city, to the Lane Hospital, and have an operation performed, in an endeavor to

(Testimony of W. H. Banks.)

get it in better apposition.

Q. Was he then taken to the Lane Hospital?

A. We first had an X-ray taken to determine the actual condition; the company did this, took him to an X-ray man in Berkeley.

Q. Was he thereafter taken to the Lane Hospital?

A. He was thereafter taken to the Lane Hospital.

[104]

Q. Was an operation performed? A. It was.

Q. By whom?

A. It has been my policy to call in as assistant some specialist and I called in Doctor Pope.

Q. Who is Dr. Pope, a physician of some kind?

A. He is a surgeon here in the city.

Q. Did Dr. Pope perform the operation?

A. Dr. Pope performed the operation and I assisted him.

Q. Was the operation successful?

A. As an operation, yes.

Q. What was the result of the operation?

A. Do you mean what was done?

Q. No, I will ask you this question: Did the man thereafter remain in the Lane Hospital for some time?

A. He was there for 105 days.

Q. What progress did the leg make during that time? A. Slow, but gradual progress to a union.

Q. There was a progress toward union, was there?

A. There was.

Q. I will ask you whether that progress was or

(Testimony of W. H. Banks.)

was not as rapid as could be expected under the circumstances?

A. Well, that is difficult to say, considering the age and the conditions that were there before, the progress was not as rapid as we would wish to see it.

Q. What happened to Mr. Hokanson after being in the hospital for 105 days?

A. I advised that he go home and keep under observation, with the idea simply of the advisability of his being at home and getting around out of the hospital, and so on.

Q. Did you have him taken home? A. I did.

Q. Where does he live? A. In Berkeley.

Q. Was he there under your care? A. Yes.

Q. And he understood he was still under your care? A. Yes.

Q. Did you have instructions or authority from the company still to keep supervision over him?

A. Yes. [105]

Q. Did you ever have orders from the company to refuse him attention? A. I did, yes.

Q. You did have orders to refuse him attention?

A. Yes.

Q. Under what circumstances?

A. Well, I saw him on December 6, 1914, and he complained of a plate that was hurting him, and I advised that he had better come back to the hospital and if necessary remove the plate, and his disposition was not exactly to do that; he said he had hospital enough; then I told him that he had better have an X-ray taken to see the condition. I reported to

(Testimony of W. H. Banks.)

the company and was advised by them to have it taken, to write Mr. Hokanson a letter, which I did, but I got no report, no answer from him; I telephoned and was told over the 'phone that they had not decided what to do, but they would notify me later; I was never notified. Then I reported to the company, asking what I had better do, and they said to let things rest as they were.

Q. Until you should hear from him again?

A. Until I should hear from him. I don't know whether that was said specifically; that was understood.

Q. Was it or was it not understood that you were to be at Mr. Hokanson's disposition in case he should call for you? A. Absolutely.

Q. I will ask you Doctor, whether or not, in your judgment as a physician and surgeon there was anything that could have been done for Mr. Hokanson to improve his condition while under your care and under that of Dr. Pope, that was not done?

A. None that I have in mind at the present time, no. I will qualify that by saying that Dr. Pope was the surgeon; Dr. Pope could answer that better than I.

Q. Did the Pacific Coast Steamship Company remunerate you for [106] your services in this connection? A. They did.

Q. What payments did they make to you?

A. I was paid for the first examination at the Lane Hospital, and I was afterwards paid for the operation and attention subsequent to the operation.

(Testimony of W. H. Banks.)

Q. Do you recall in what amount?

A. I received a check of \$7.50 for the examination at first, and \$250 for the operation and attendance.

Cross-examination.

Mr. THACHER.—Q. Have you got that X-ray that you took of the leg before you made your operation? A. I have the plate at the office.

Q. I wish you would have it sent down.

Mr. GRIFFITHS.—Yes; which X-ray are you speaking about now?

Mr. THACHER.—The first X-ray.

Mr. GRIFFITHS.—Before the operation?

The WITNESS.—The prints of that are here.

Mr. GRIFFITHS.—I will offer that in evidence; it being understood that that was the condition of the leg as it was when he came to Dr. Banks; of course, this man was in the United States Marine Hospital at Port Townsend for the period from December, 1913, until May, 1914, when he came to Dr. Banks at the Marine Hospital here.

Mr. THACHER.—Q. Will you identify this picture? A. I do.

Q. As being what?

A. As being prints of the plates that were taken by Dr. Martin and myself, of the right thigh of Mr. Hokanson.

Q. Practically, as I note in these plates, there is almost no union of the bone, is there? How about that?

A. Well, there is considerable callus grown out there, yes.

(Testimony of W. H. Banks.)

Q. But this part here between the two bones, that is simply callus? [107] A. Callus.

Q. So there was no bone at all?

A. That is bony callus.

Q. But not the kind of solid bone that you see—

A. (Intg.) That is the part that becomes the solid bone.

Q. It ultimately may become solid bone?

A. It ultimately may become solid bone.

Q. But it had not become solid bone in this?

A. It was pretty solid when we fitted it.

Q. But it was so slight that it was very light at the time you took the photograph—I mean to say that you can see that this part isn't the same as that part?

A. Because it has not the bony tissue in it that the regular bone has.

Q. A leg like this is extremely weak, is it not?

A. Well, yes, it is.

Q. And any weight thrown upon it is extremely painful, is it not? A. I think so.

Q. Because of the natural effect, that it would practically force the lower part of this bone even and tend to tear down this part of the bone?

A. Not if there is a solid union.

Q. No, I mean under the conditions here.

A. Yes.

Q. Is it not a fact also that here was a case of where his leg, because the upper part of his leg went in one direction and the lower part in another, so that it tended to force these parts of the bone to—

(Testimony of W. H. Banks.)

gether, it would be extremely painful?

A. Of course, a fracture of the bone is always painful.

Q. These jagged edges here?

A. Unless the bone is solid enough to keep it up, there will be pain.

Q. Of course, you would not have operated if the operation before had been a success, or anything like a success? A. I would not.

Mr. THACHER.—I think I can save you time there; I am [108] quite perfectly *read* to admit that that so-called union there was a bad union, a poor job done before the man came under Dr. Banks' attention, and that Dr. Banks thereafter, in view of that fact, seeing that the job was poorly done, advised a re-operation.

Mr. THACHER.—I do not think there will be any question about that, except simply in the way of bringing out as a natural result of this fall there was and must have been a tremendous amount of suffering and pain incurred on the part of the sailor who fell down from the rigging and that is really all I want. I will offer that in evidence.

Q. Dr. Banks, how many times did you visit Mr. Hokanson in Berkeley; you say that he was under your care and supervision over there.

A. I saw him first in Berkeley on June 14; I saw him again on July 2d, prior to the operation.

Q. June 14 and July 2d and then when?

A. I saw him on December 6th, in Berkeley.

Q. So that the care and supervision that he ob-

(Testimony of W. H. Banks.)

tained after he returned from the hospital was the extent of one visit? A. One visit.

Q. And that was all?

A. It was all that was necessary.

Redirect Examination.

Mr. GRIFFITHS.—Q. Was there any time that Mr. Hokanson asked you to come to see him at his home that you refused to go? A. No.

Q. You were ready to go at any time that you were asked? A. I was always ready.

Q. As a matter of fact, on the last visit of yours, did he seem to welcome your visit very much?

A. I would not say that he did not welcome me, but the impression that I got from him was that he was offish with reference to any further treatment. [109]

Testimony of S. T. Pope, for Respondent.

S. T. POPE, called for the respondent, sworn.

Mr. GRIFFITHS.—Q. Dr., are you a practicing physician and surgeon here in San Francisco?

A. Yes.

Q. What is your specialty, if any?

A. I am instructor in surgery in the University of California.

Q. In addition to that appointment in the medical school, you are also a practicing surgeon, are you not? A. Yes.

Q. Of what institution are you a graduate?

A. Of the University of California.

Q. The medical school? A. Medical school.

(Testimony of S. T. Pope.)

Q. What year? A. 1899.

Q. You have been practicing since that date?

A. Yes.

Q. On or about July 10, 1914, did you perform an operation on Mr. Hokanson, the libelant, here?

A. Yes.

Q. Was the operation successful?

A. Not entirely.

Q. Was it as successful as could be expected under the circumstances? A. Yes.

Q. It was? A. Yes.

Q. Did you have him under your care and supervision afterwards, or was he thereafter under Dr. Banks' care?

A. Dr. Banks took the actual care of the man afterwards; I saw him in consultation only.

Q. I will ask you whether or not in your judgment as a surgeon anything could be done for Mr. Hokanson during that operation and since the operation, which was not done.

A. We did everything that was apparently necessary, placed the bones end to end, put a plate on, but they failed to unite.

Q. Did they unite at all?

A. He had, at the last examination, [110] only a partial union.

Q. Can one be sure of a union in a man of Mr. Hokanson's age, Doctor?

A. In the matter of a mal-union, we cannot count upon union after delayed fractures of this type; that is, the bones are put in proper position, end to end,

(Testimony of S. T. Pope.)

but the callus formed was not sufficient to produce union.

Q. At his age?

A. The factors are not well known; it is not entirely the age; but apparently the process of repair had exhausted itself and the cuticle could not produce union.

Cross-examination.

Mr. THACHER.—In other words, Dr. Pope, as I understand it, the operation, when you undertook it, was an extremely difficult one?

A. It was very difficult.

Q. It was just practically a chance?

A. Mechanically, it was possible.

Q. But like one of the very difficult operations of surgery? A. The end results were a chance, yes.

Q. And it was only undertaken because of the suffering and the hardship of Mr. Hokanson which he would have had if he continued with his old leg?

A. Yes.

Q. As a result of this, as I understand it, you took this chance to see if it would put Mr. Hokanson on his feet, and as very naturally comes about, it was not really a success? A. Yes.

Q. So that Mr. Hokanson remained still really a cripple? A. Yes.

Q. And a union of that kind is one which does cause suffering? A. It is painful, yes.

Q. And it will incapacitate him from really any kind of work that is physical?

A. As he stands now, but I wish you to under-

(Testimony of S. T. Pope.)

stand that he has possibilities yet.

Q. You mean to be operated on again?

A. Yes; of course, that [111] is beside the case.

Testimony of Axel Hokanson, in His Own Behalf.

AXEL HOKANSON, the libelant, called in his own behalf, sworn.

Mr. THACHER.—Q. Mr. Hokanson, will you state what your experience as a seaman has been?

A. I started to go to sea in 1872 and I followed it up right along until I had the accident in 1913, December 10, 1913.

Q. You started in 1872. What have you sailed as?

A. I sailed as seaman, able seaman, boatswain and second officer.

Q. Are you the libelant in this case? A. Yes.

Q. Now, will you state how you happened to be on the "Senator" on December 10, 1913.

A. I was on the steamer "President" previous to going on board the steamer "Senator."

Q. Where? A. In Seattle.

Q. Who owns the "President"?

A. The Pacific Coast Steamship Company, as far as I know.

Q. Where was the "Senator" when you joined her? A. In Seattle.

The COURT.—Q. Did they transfer you?

A. Yes, your Honor.

Mr. THACHER.—Q. When did the "Senator's" crew take her down?

A. I do not believe there was a crew aboard the "Senator."

(Testimony of Axel Hokanson.)

Q. Why not?

A. I guess they were paid off—I guess she must have been laid up, as far as I know; when she came from Nome, the crew was discharged.

Q. What was your position on the “Senator”?

A. Seaman.

Q. Were you in Victoria on December 10?

A. Yes.

Mr. GRIFFITHS.—What year?

Mr. THACHER.—1913.

Mr. GRIFFITHS.—He was in Victoria on December 10, 1913, was he? That is the date of the accident, presumably. [112]

Mr. THACHER.—I thought it was admitted that on December 10, the “Senator” left Victoria, British Columbia.

Q. Where was the mainsail of the “Senator” when you came on board?

A. It was hoisted up in the same position as it was when I was sent up aloft to clear it.

Q. Will you describe how it was?

A. It was furled and stopped about two feet apart, and hoisted up on the halyards until it was about four or five feet, or nearly so, clear of the deck.

Q. How did you happen to go up in the rigging of the “Senator” on the afternoon of December 10th?

A. I was ordered up there by the boatswain.

Q. Will you explain what the boatswain said?

A. I do not remember exactly if he said, “Axel” or “Alec,” but either one of the two, he said, “Go

(Testimony of Axel Hokanson.)

up and see if you can clear that sail."

Q. Who was there at the time?

A. A seaman by the name of Gunderson; he was at the sail trying to pull it down; the haliyards were let go already, and he was standing pulling at the sail.

Q. He was pulling on the sail?

A. He was pulling on the sail from the deck.

Q. Who else was there?

A. Robert Martin was there.

Q. Was Anderson there?

A. I don't remember seeing Anderson, but I guess he was around there; he was winch driver; I don't know if he was doing anything to the winch; I don't remember seeing him there, but I kind of think he was in the quarters there.

Q. What time was it that you went aloft?

A. Between 3 and 4 P. M.

Q. What was the condition of the weather?

A. The weather was cloudy, overcast.

Q. Will you describe your going aloft, in the first place, describe what you did first?

A. As I was ordered up to [113] clear the sail, I went up in a seamanlike manner.

Q. How do you mean, in a seamanlike manner?

A. Well, taking hold onto the shrouds with the hands, and using my feet on the ratlins, the same as a man would go up a ladder.

Q. Then what?

A. When I came up to on or about the sixth ratlin from the top, I had my right hand through the

(Testimony of Axel Hokanson.)

shroud and my left hand outside of the shroud on the forepart, and I reached for the haliyard and I got it, and I overhauled some slack, and I made three or four pulls from the outside as I was standing, on the outside of the rigging, but it would not come down; I investigated, and I could see all the strain practically was hanging on the upper hank of the sail that grasped the jackstaff, and I could not get at it in any other way, and I stepped from the outside of the rigging to the inside of the rigging with my right foot between the two middle shrouds, as near as I can remember, and I reached out—I was holding onto the shrouds with both hands, and I reached out with the left leg and I gave that upper hank a kick, and at that very moment the ratlin that I stood on gave way, and I lost my grip and I came down.

Q. Where was your right foot, between the shrouds?

A. As near as I can remember, it was between the two middle shrouds.

Q. What kind of boots did you have on?

A. Something like these I have got on now.

Q. Where did you rest them on the ratlin?

A. Right here.

Q. On the instep? A. On the instep, yes.

Q. Are you sure of that? A. Positive.

Q. What did you have hold of with each hand?

A. The shrouds.

Q. And you reached out with your left foot; how far did you have to reach?

A. I could not give the distance, but I reached it

(Testimony of Axel Hokanson.)

quite easy, without any strain of any kind. [114]

Q. Now, you say the hank was stuck? A. Yes.

Q. Now, will you describe how the hank looks, how it runs on the jackstaff?

A. Well, we will say this is the jackstaff, and this the hank clasp, the iron batten inside of the jackstaff, and this is bolted to the mast; there is a little space, we will say about probably an inch or maybe not so much there, so that the hank can travel freely up and down on that slide on the jackstaff; sometimes the hank gets caught when the jackstaff is not kept in proper order, either oiled or graphited; it ought to be looked after once in a while, but in this case it was rusty.

Q. What else could you have done to get that sail down?

A. Nothing that I know of; that is the only possible way that I could get at that sail.

Q. Have you ever worked on the side of the shrouds before? A. Oh, it is common.

Q. How common?

A. Well, it is done very frequently; when a seaman is up aloft and his work calls to do so, when it is absolutely necessary to do so, he does it.

Q. Yes, but I mean how frequently do men go in and out of one side or the other of the shrouds?

A. It is done all the time, when necessary to do it, when they have to do it.

Q. It is not uncommon? A. It is quite common.

Q. Mr. Hokanson, what makes you think a ratlin gave way?

(Testimony of Axel Hokanson.)

A. Why, I felt it distinctly, what I stood on gave way from under me.

Q. What is the next you remember?

A. I remember laying on the hatch where I fell, in agony.

Q. What happened to you while you were lying on the hatch?

A. The first thing I thought of was my folks at home, and I asked Mr. Sorenson, the chief officer, to come, I wanted to give him my [115] address, and when he came the captain came about the same time, or nearly the same time, and the purser, and I gave my address, everybody was standing around me, a good many of them, by that time, and the captain said to the purser, "Note that down."

Q. Then what happened?

A. I said afterwards to everybody that was standing around me, I said, "Everything is rotten up there."

Q. How much did you weigh at the time?

A. About 170.

Q. That is, with your clothes on?

A. With my clothes on.

Q. Do you remember anything else being said, or what happened down there on the hatch?

A. A seaman by the name of Henry Anderson came to me and he bent his head down close to me and he said, "How did it happen," and I told him the ratlin gave way.

Q. Did you have any conversation with anybody else? A. No.

(Testimony of Axel Hokanson.)

Q. Did you ever tell the captain that your foot slipped? A. No.

Q. What happened then?

A. I was taken into the social hall, I don't know how long exactly I remained there, but it was getting just about dusk and it started to rain slightly, and I was put in the ship's boat, and they pulled away from the ship, and as near as I can remember, I was transferred into the life-saving station boat and landed at the beach at Neah Bay.

Q. Then what happened after that?

A. One of the men belonging to the life-saving station said, "The doctor will be here pretty soon"; the doctor came and he gave me chloroform, and when I waked up again I was in splints; I was taken into the boat again, I don't know what boat, but it was some small boat.

Q. When was that, that day or the next day?

A. That very night; that must have been in the neighborhood of eight o'clock in the evening; it was dark; it had been dark quite a while; and I was transferred aboard the revenue cutter "Snohomish"; the "Snohomish" was laying to an anchor, and she did not heave the anchor until [116] seven o'clock the following morning.

Q. You stayed over night on the cutter?

A. I laid in a hammock on board of the revenue cutter "Snohomish" during the night; at seven o'clock in the morning, they hove anchor and proceeded on to Port Townsend.

Q. Then what happened?

(Testimony of Axel Hokanson.)

A. I was put in the boat again, the small boat, and landed at a wharf, put in a machine, and I came to the hospital.

Q. How long were you at the Port Townsend Hospital?

A. I came there on or about December 11, the day after the accident happened, and I remained there to on or about May 15th, the following year.

Q. Then where did you go?

A. I was put aboard of the steamer that ran around the sound there with passengers, that came into Port Townsend, and I was taken over to Seattle; I landed at Seattle and I was put on board of the steamer "Governor," that belonged to the Pacific Coast Steamship Company.

Q. Then where did you go?

A. I arrived in San Francisco on or about the 18th of May.

Q. What did you do there?

A. The company sent me to the Marine Hospital here in San Francisco.

Q. How long did you stay there? A. 24 hours.

Q. Now, Mr. Hokanson, how badly were you injured, as you remember it, by the fall? What was the extent of your injuries when you reached Port Townsend hospital?

A. I had a compound fracture of the right thigh; I could see the bone through the muscle.

Q. What do you mean by "through the muscle"?

A. Well, I could see the bone through the muscle, I could feel it through.

(Testimony of Axel Hokanson.)

Q. You mean the bone protruded?

A. The muscle protecting the flesh broke and I could feel the bone with my finger. [117]

Q. You could feel the bone, itself?

A. I could feel the bone with my finger.

Q. Was anything else the matter, and if so, what?

A. I was badly bruised up, the whole of my body, and my left leg, from the foot right up to my hip, was black and blue.

Q. How about this part of the body (illustrating)?

A. My head was affected a good deal; it was singing pretty badly when I was in the Port Townsend hospital; it was singing when Mr. Banks examined me home, after I came home.

Q. Were you bruised, or were you cut or anything?

A. I was cut nowhere except where the compound fracture was, where the muscle broke, but I was practically stiff; I could hardly put my hand to my mouth when I was laying on my back in the Port Townsend Hospital.

Q. For how long couldn't you put your hand to your mouth?

A. Well, it took about three or four weeks before I could use it and use it pretty good.

Q. Did you suffer at all at the Port Townsend Hospital? A. Yes.

Q. Describe it, as well as you can?

A. Well, I could hardly describe it in words, what I suffered there, laying on my back; I could not move.

(Testimony of Axel Hokanson.)

Q. How much could you move?

A. Well, just a little bit with my arms.

Q. Couldn't you sit up in bed?

A. How I could sit up, I had 32½ pounds hanging on that right leg that was broke, for fourteen weeks.

Q. During the entire time, or any part of the time, couldn't you raise your head?

A. At the latter part I had three pillows, so my head was raised up a good deal, or elevated, but I never could sit up in bed, because it always hurt me here. [118]

Q. How constant was your pain?

A. It was constant pain all the time while I was in the Port Townsend Hospital.

Q. What was your condition when you arrived here in San Francisco from the north in May?

A. I was very weak; I could not walk by myself on crutches, I had to have somebody to steady me, or I would fall down.

Q. How about any pain?

A. Well, the pain was various, sometimes more and sometimes less.

Q. Now, how long a time did you stay at home after you went home in May?

A. I stayed home to on or about July 10th.

Q. What was your condition at home?

A. I was very weak.

Q. What do you mean by that?

A. Well, not able to handle myself very good; I could not raise myself from a chair without help.

Q. Could you get around on crutches?

(Testimony of Axel Hokanson.)

A. Very little.

Q. Well, how much?

A. Well, I might be able to crawl along on the floor back and forth a couple of times.

Q. A couple of times?

A. Well, for five or ten minutes or so, then I got tired and had to sit down.

Q. Could you go outside and walk up and down?

A. With help.

Q. What do you mean, "with help"?

A. Somebody to help me.

Q. You mean somebody at your side?

A. At my side.

Q. Is that the only way you could do it?

A. That is the only way I could do it for a long time.

Q. Now, after, on or about July 10, what happened?

A. I left home for the Lane Hospital. I was operated on the following day. I remained there to or about October 24 and I was sent home.

Q. How much pain did you have while you were at the hospital on that second occasion?

A. It was not so much as it was in the Port Townsend Hospital, it was much easier.

Q. That was October 24, 1914, was it?

A. Yes. [119]

Q. Now, Mr. Hokanson, since that time how have you been able to get around?

A. I have been able to get around on crutches.

Q. Now, take the matter of the first six months,

(Testimony of Axel Hokanson.)

how completely were you laid up?

A. I could not get along very good, not so good as I can now, by far.

Q. That is, the six months from the time you came back from the Lane Hospital? A. Yes.

Q. How much have you used your crutches in getting around, if you had to use your crutches?

A. All the time except recently; I tried to walk with a stick around the house, but the splint hurt me, I can't do it very well, but I tried it; I thought I would put all the weight I could on the leg.

Q. Did it pain?

A. Yes; there is no strength in the leg.

Q. Do you have any feeling of numbness, anything of that kind?

A. Well, the leg feels feverish and the foot is ice cold; at this present moment it feels like a piece of ice.

Q. How much can you bend your leg?

A. Like that (illustrating).

Q. Can't you bend it any more than that?

A. No; anybody can come here and try it.

Q. How about any question of pain that you have in the leg, aside from when you stand on?

A. I don't understand.

Q. Do you have any pains in your leg aside from when you stand on it?

A. I get cramps very frequently; sometimes in the night, when I am lying in bed, I get cramps, and they might last for quite a while, sometimes half an hour.

(Testimony of Axel Hokanson.)

Q. Do you notice any effect of changes in the weather? A. Yes.

Q. What effect? A. It starts to ache.

Q. How much?

A. Well, considerably, I can't say how much.

Q. How frequently does that happen, how often?

A. Any change of weather, when the weather is kind of damp or foggy. [120]

Q. What papers did you have when you were injured, as a seaman or sailor?

A. I have got second mate's license unlimited, for steamships.

Q. How much were you earning at the time you were injured?

A. My standing wages were \$50 a month, that is, seamen's wages, and we averaged on or about \$30 a month overtime; that is, we had 50 cents an hour overtime when we worked overtime, and we averaged about 60 hours a month, on or about 60 hours.

Q. How long had your wages been at that rate?

A. It was that way all the time I was on the steamship "President," I don't know how much they would average on the "Senator," because I was only there three days.

Q. How long were you on the "President"?

A. The last time I was on her I was on her pretty near a year.

Q. Where had you been before you had been on the "President"?

A. I was on a steamer by the name of "Speedwell"; I was second officer there.

(Testimony of Axel Hokanson.)

Q. What were these ratlins made of?

A. They were made out of gas-pipe, as far as I know.

Q. Have you ever inspected ratlins on ships?

A. I have been sent up to repair ratlins, yes.

Q. To inspect ratlins? A. Yes.

Q. What inspection do you make?

A. Well, if I have any doubt about a ratlin not being seaworthy or the seizin being unseaworthy, when I am up aloft and I generally have what is customarily called a marlin spike with me, and I take the heavy end of the marlin spike and come down on the ratlin like that, a good blow, and if the ratlin will stand that blow, it will stand a man's weight, if he isn't over 200 or 300 pounds.

Q. Can you ascertain by inspection whether a ratlin will break, or [121] not?

Mr. GRIFFITHS.—What do you mean by inspection, by this test?

THACHER.—By this test; as I understand, he testified to that anyway, that an inspection would show whether the ratlin would break or not.

A. A ratlin, where there is smoke going through, inside and outside, and there is soot and paint and one thing or another, it is pretty hard to inspect a ratlin without trying it the way I do with a marlin spike, or with a heavy hammer; that is the only way that I know of, unless you can see for yourself that it is too far gone; then you don't have to inspect it; you can see it is gone and condemn it.

(Testimony of Axel Hokanson.)

Q. How about the seizings, can you tell from an inspection of them?

A. The seizing might be burned; it might be decayed by wind and weather and still all the turns might be around the shrouds and the ratlin, but by putting weight on it, it has got to come; the only way, as I said before, is to tie it.

Cross-examination.

Mr. GRIFFITHS. — Q. Mr. Hokanson, the shrouds and the ratlins that you speak of on a ship are like a ladder, aren't they?

A. You see this grating here, where you will say these are the shrouds that run up and down; this part here will represent the ratlin.

Q. Only on a ship, of course, there will be four of these shrouds instead of two, will there not, or rather, there was on the "Senator"? A. Four.

Q. Four instead of two? A. Yes.

Q. Is the ratlin one piece of pipe or iron that goes clear across? A. Just one piece.

Q. Not a separate piece between each shroud?

A. No. [122]

Q. If you turn your grating upside down, that will represent very nearly the shrouds and ratlins?

A. Exactly, because they come too close here.

Q. To a point? A. Yes.

Q. That is, they hook on to the mast, so to speak?

A. The band that comes around the mast.

Q. They come to a point on the mast? A. Yes.

Q. And the ratlins become narrower as you get up towards the top? A. Yes.

(Testimony of Axel Hokanson.)

Q. Now, tell me about how far from this point where your shroud tucks into the mast at the point, how far down from that was the top of this sail that was furled up along the jack-staff; what distance would that be? A. I don't remember.

Q. Do you remember roughly?

A. I cannot give any estimate, but when I stood on or about the sixth ratlin, the hank I could see in line with that ratlin, or nearly so; that is the only estimate I could give.

Q. You could not have reached the hank that you kicked if you had been standing up higher than the sixth ratlin, could you?

A. I don't remember that; as near as I can give it to you it is that the hank of the sail that I kicked was on a line with about the sixth ratlin that I stood on.

Q. You think you were standing on the sixth ratlin? A. On or about the sixth ratlin.

Q. How far apart are the ratlins?

A. About twelve inches, I should say.

Mr. GRIFFITHS.—Mr. Thacher, these are some photographs that were taken of the mast of the "Senator"; they were taken last year, or probably sometime afterwards, so that I do not pretend, of course, that they represent exactly the condition of the ratlins, [123] or anything of that sort at that time, but I would like to use them simply to give the court a picture of the way these ratlins go up the mast.

Mr. THACHER.—All right.

Mr. GRIFFITHS.—Q. Now, upon this photo-

(Testimony of Axel Hokanson.)

graph which I show you, Mr. Hokanson, and which is marked exhibit "A," you see the shrouds running up to the mast in the way that you have described, don't you? A. Yes.

Q. And the ratlins are shown here across?

A. Yes.

Q. Will you show me where the top of the said is on that? Can you do that—about where that mast-head is—is that clear enough so that you can see the top of the sail?

A. Yes, but this sail could have been hoisted up; this sail is not in the same position as when I went up to take it down.

Q. How was it when you went up to take it down?

A. It was higher up.

Q. It was not higher than about the sixth ratlin, was it—was the top of the sail higher than the sixth ratlin?

A. That is pretty hard for me to remember, all that, at the moment, but you can make that sail up in different ways; you can make it up different heights.

Q. The sail will go up different heights?

A. You can make it up different heights; if you were to make that sail up a hundred times, you could not get it in the same place twice.

Q. I cannot see that, your Honor; I was under the impression that the sail went up to a particular height; if a ratlin were actually out, that is to say, if there were a gap between the shrouds, you could see that below, couldn't you? A. Yes.

(Testimony of Axel Hokanson.)

Q. You told Mr. Thacher, I think, that the seamanlike manner to go aloft was always to hold on to the shrouds, did you not? [124] A. Yes, I did.

Q. What is the reason for that; why do you always hold on to the shrouds?

A. Because that is the main thing to hold on to.

Q. That is to say, you mean by that that the shrouds, being, so to speak, the side pieces of the ladder, you can count on them as being secure, can't you, just as we can count on the sides of the ladder being secure, they will hold; if you just hold on to the shrouds, they will hold, won't they? A. Yes.

Q. On the other hand, you say that as to the ratlins, you never can be perfectly certain, if I understand you, that there is not some secret or hidden weakness to them, so that you cannot test them for sure, unless you use—what did you say, a marlin spike—to strike them? A. Yes.

Q. In other words, you have to put them through a thorough test to be absolutely sure they are sound, that is, of course, except if they are rusty, you could see that, couldn't you?

A. Yes, you could see if it was rusty.

Q. If it was like ashes, you could see that easily?

A. Yes, I think so.

Q. If there were any gap, you could see that?

A. Yes.

Q. What was this hospital at Port Townsend that you went to? Do you know what the name of that hospital at Port Townsend was, do you remember?

A. The Marine Hospital, the Government hospital.

(Testimony of Axel Hokanson.)

Q. The Government hospital, the United States Government hospital?

A. The United States Government hospital.

Q. The United States Marine Hospital at Port Townsend? A. Yes.

Q. When you left there, you left at your own request, did you—you wanted to go away—or did they send you away?

A. No, I asked to be sent home, because I was getting weaker and weaker every day. [125]

Q. Then you came down here to what institution in San Francisco? A. To the Marine Hospital.

Q. That also was the Government hospital?

A. Yes.

Q. United States Government? A. Yes.

Q. You did not have any bills to pay for medical expenses or anything of that sort, up north, did you?

A. No.

Q. Or for your fare down here?

A. The company gave me first-class passage down.

Q. You did not have any bills to pay at the Lane Hospital, did you? A. No.

Q. Or any bills to pay to Dr. Banks or Dr. Pope, for any of their services? A. None whatsoever.

Q. Did Dr. Banks ever refuse to see you again after December, when he was over there the last time? A. No.

Q. He was willing to come, was he not, if you should call for him?

A. I did not ask him about that; if I had called him, I guess he would have come.

(Testimony of Axel Hokanson.)

Q. You understood that he was perfectly ready to continue attendance upon you if you needed his aid, didn't you? A. Yes.

Q. And the last time he saw you you told him that that plate was hurting a little, didn't you?

A. Yes.

Q. Did he say that he would relieve you, or endeavor to relieve you, of that pain, if you so desired, and for you to call him up if you wished to?

A. He suggested for me to go into the hospital again and have it taken out, and I was thinking about that, I had enough hospital.

Q. You did not want to go to the hospital again?

A. I just asked him, "What do you think I was made of, a log of wood, or something," that he could do anything he liked; that is the way I put it.

Q. Was Dr. Pope kindly and considerate of you in the operation [126] and afterwards?

A. He treated me very fine, the best he knew how, apparently, in my judgment.

Q. Now, has the Pacific Coast Steamship Company paid you any sums of money, Mr. Hokanson, or given you any sums of money? A. Yes.

Q. Do you recall what those amounts are?

A. Yes, exactly.

Q. How much?

A. Altogether, \$175; \$25 each time three times, and \$50 before I went in the Lane Hospital, and my wife got \$50 during the time I was laying in Lane Hospital; that is all; if they say more, they will have to show the signature.

(Testimony of Axel Hokanson.)

Q. I am not making any claim for any more, Mr. Hokanson; I am just asking you to know whether I should have to make that proof myself. In taking you back and forth to your home, they were considerate of your condition, furnished a taxicab?

A. Taxicab, yes.

Q. At Seattle and here?

A. At Seattle I was in the ambulance; I could not use crutches; I was in an ambulance.

Mr. THACHER.—Q. What was the condition of the shrouds—did you notice any particular condition of the shrouds, when you went up, of the ratlins when you went up—I should say the ratlins?

A. There were some ratlins missing.

Q. Some missing? A. Some missing, yes.

Q. Did you notice anything aside from the ratlins missing—did you notice anything particular about them? A. Not that I can recollect.

Q. How closely did you examine each ratlin as you went up?

A. I did not examine the ratlins exactly; it is not the customary thing for a seaman when he goes up to go and look first at each ratlin, and see if it is all right, and look at each one until he gets up to his place where he is going to work; if the people saw him, or happened to see him do that, they would say that man was crazy. [127]

Mr. GRIFFITHS.—Q. That is why you hold on to the shrouds as you go aloft, because you cannot stop to make a thorough test of every ratlin?

A. That is the reason we hold on to the shrouds.

(Testimony of Axel Hokanson.)

Q. On the shrouds, which is a secure hold?

A. Yes, but the ratlins are supposed to be secure, also; that is what they are there for.

(A recess was here taken until two P. M.) [128]

AFTERNOON SESSION.

Testimony of Charles Hasse, for Libellant.

CHARLES HASSE, called for the libellant, sworn.

Mr. THACHER.—Q. Mr. Hasse, what is your occupation? A. Master mariner.

Q. What has been your experience at sea?

A. I have been at sea for over 40 years.

Q. How long have you been a master?

A. Nine years.

Q. Captain, how are inspections of ratlins made on a boat?

A. The only inspection—it depends on what kind of a ratlin it is.

Q. Take the case of a pipe ratlin.

A. Well, the only inspection that can be done there is to send a man up there with a heavy marlin spike, or something to test the pipe, to see if it is rusted off, or anything, and take the point of the marlin spike and try the seizin.

Q. What will that show?

A. That will show if they are good or bad.

Q. Will it show whether or not it would hold a man? A. Yes, it will show that.

Cross-examination.

Mr. GRIFFITHS.—If the ratlins were badly

(Depositions of Charles Hasse.)

rusted, could you easily see that, Captain?

A. Yes, you could easily tell that; any man, any sailor, could easily tell that.

Q. The ratlins would be just about before your eyes as you ascended the shrouds, would they not—the ratlins would be about on a level with your eyes as you go up the shrouds, right close to you?

A. Yes.

Q. If there was a gap in the ratlins, any missing, you could see that easily, of course? A. Yes.

Q. What is the seamanlike way to ascend aloft, what do you hold to?

A. Well, when you are going up the rigging, a man will grab hold of the shrouds. [129]

Q. The shrouds?

A. Yes; it is a foolish sailor who grabs hold of the ratlins.

Q. Why does he hold onto the shrouds?

A. Because there is more stability of them, and he takes hold of the shrouds in each hand and works up.

Q. If he has got a good hold on the shrouds, it does not matter what gives way?

A. Yes; even if the ratlins give way when you work up, you generally hold onto the shrouds.

Q. As I understand, it is a careless and negligent seaman that does not hold onto the shrouds?

A. Yes.

Mr. THACHER.—That is our case.

Mr. GRIFFITHS.—If your Honor please, the defense will be that no ratlin gave way under the foot of Mr. Hokanson, but on the contrary he swung out

(Depositions of Charles Hasse.)

from the shrouds, or rather from the ratlins, and jumped onto the top of the sail with both feet, and loosened it in that way; that falling, his falling was due to the fact, apparently, that he did not take, as he should have taken, and as a good seaman should have taken, a secure hold upon the shrouds, which, of course, are one security aloft; that so far as the owners of the vessel are concerned, the vessel was amply equipped with cordage, and rope, and all the other material and equipment of a ship necessary to keep her in good order, and in so far as this equipment was not properly used, that was failure upon part of the officers of the ship, who should have made use of that which was amply provided for them by the owners; that so far as the care of Mr. Hokanson afterwards was concerned, the ship, immediately after the accident, showed Mr. Hokanson every consideration that could be shown him under the circumstances, and immediately put the ship about for Neah Bay, which was the nearest port, having sent, as the deposition of Captain [130] Hannah shows, a wireless to make sure that a doctor was there, placed him then in charge of the doctor on the United States revenue cutter, which came out to meet the ship.

The COURT.—I understand there is no question in the case as to the treatment received after the accident.

Mr. GRIFFITHS.—I want to show he went into the charge of the United States Marine Service. I offer in evidence the deposition of Dr. C. L. Woods,

(Testimony of Oscar Silow.)

who had charge of Mr. Hokanson at Neah Bay, and of Dr. P. I. Carter of the United States Marine Hospital, at Port Townsend, and of Captain C. J. Hannah, who was master of the "Senator" at the time of the accident. I will also offer in evidence this statement of expenditures made by the Pacific Coast Steamship Company for hospital and medical services to Mr. Hokanson, and for other incidentals in connection therewith, this statement including the items of \$7.50 and \$250 paid to Dr. Banks, to which he testified this morning, but not including the payment for maintenance of Mr. Hokanson, to which he himself testified this morning. This statement is agreed to as correct by counsel upon the other side; that is true, is it not, Mr. Thacher?

Mr. THACHER.—Yes.

Mr. GRIFFITHS.—Accompanying that, I will also offer the duplicate receipt from the Lane Hospital, which is one of the items appearing in that list; the other original receipts are at the main office of the company at Portland.

Testimony of Oscar Silow, for Respondent.

OSCAR SILOW, called for the respondent, sworn.

Mr. GRIFFITHS.—Q. Mr. Silow, where were you employed on December 10, 1913?

A. On the "Senator."

Q. In what capacity?

A. As boatswain. [131]

Q. With whom were you employed immediately

(Testimony of Oscar Silow.)

prior to your employment on the "Senator," with what company?

A. The Alaska Steamship Company.

Q. How far is it, Mr. Silow, from the smokestack on the "Senator" approximately to the mainmast?

A. About 40 feet.

Q. Did you see Mr. Hokanson go aloft that day, that afternoon? A. Yes.

Q. Did you order him aloft?

A. No. He went before I had a chance to tell him.

Q. What were you doing or endeavoring to do with the sail at that time?

A. To take it down, to get it down on deck.

Q. Was it stuck? A. Yes, it was stuck.

Q. Did you watch Mr. Hokanson as he went aloft?

A. Yes.

Q. What observations did you make in connection with the lowering of the sail at that time; what did you see happen at this time?

A. I saw Hokanson go aloft, and he was standing on a ratlin, and he had hold of the shroud with his two hands, and he jumped on to the head of the sail with his two feet and the sail gave way a little, so Hokanson lost his footing—

Q. (Intg.) His footing where?

A. His footing on the sail; the sail gave way a little.

Q. What happened then?

A. He must have lost his hold with his hands and fell down.

Q. Did you see him fall? A. Yes.

(Testimony of Oscar Silow.)

Q. What ratlin was he standing on?

A. On the eighth ratlin from the top.

Q. What did you do immediately afterwards, after he fell?

A. After he fell I first helped to bring Hokanson into social hall, and then I got orders from the first officer to see if there was anything carried away, which I did. [132]

Q. What did you find?

A. I found that nothing had carried away.

Q. Did you or did you not find any ratlins hanging down loose? A. No.

Q. Any evidence of any recent breaks?

A. No, no recent breaks.

Q. What ratlins did you stand on when you went aloft there yourself?

A. On the same ratlin; in fact, I was on several, to examine the condition of them.

Q. What was their condition?

A. Some of them, they were very poor, but some were all right; there was a couple of them that were in poor condition.

Q. Where were the poor ratlins?

A. On the third and fourth ratlins down from the top.

Q. Were any in bad condition lower than that?

A. No, not that I saw.

Q. Now, do you remember that photograph being taken along in May of this year? A. Yes.

Q. Is that you aloft on the mast?

(Testimony of Oscar Silow.)

A. Yes, that is me.

Q. Does that show the ratlins and shrouds on which Mr. Hokanson was standing on the occasion of the accident? A. Yes, they show.

Q. On what ratlin were you standing there?

A. I was standing on the eighth ratlin there.

Q. Did you observe at the time that photograph was taken, how the sail was furled up?

A. Yes, it was furled up the same way as it is now.

Q. You mean on the occasion of the accident it was furled up in the same way as it is on the photograph? A. Yes.

Q. How high is it furled on the photograph—I do not mean in distance, but—

A. (Intg.) Oh, it is furled as high as it can be furled; you can't hoist it any higher than it is now, than the photograph shows. [133]

Q. Did you take particular notice that time to see that it was hoisted at that time as high as it could be?

A. Yes.

Q. Did I ask you what ratlin you were standing on there—what ratlin were you standing on?

A. The eighth ratlin.

Mr. GRIFFITHS.—I offer this photograph in evidence; it is marked here as exhibit "A"; I ask that it be given an appropriate number.

Q. Now, Mr. Silow, I show you another photograph; was this taken at the same time as the previous photograph? A. Yes.

Q. That is you shown there in the photograph?

(Testimony of Oscar Silow.)

A. Yes.

Q. Is the sail there also furled to the same extent as you have testified to?

A. Yes, it is furled to the same height.

Q. As high as it could be? A. Yes.

Q. What are you showing by your position in the photograph?

A. I am showing the position that Hokanson had at the time.

Q. That illustrates your account of the accident, does it? A. Yes.

Q. And the way in which you think it took place?

A. Yes.

Mr. GRIFFITHS.—This is marked exhibit "C"; I offer it in evidence as one of respondent's exhibits.

Q. Mr. Silow, I will ask you whether or not, in your experience as a sailor, or a man of the sea, you have had occasion to lower sails which were furled as this sail was? A. Yes.

Q. How did you do it?

A. I did *in* practically the same way as this was done.

Q. What did you hold on to?

A. I would hold to the shrouds if I were to do what Hokanson did there.

Q. Why do you hold to the shrouds?

A. It is safer to hold on to the shrouds than on to the ratlin.

Q. In other words, do you trust to your hand hold or foot hold? A. I trust to my hand hold. [134]

(Testimony of Oscar Silow.)

Q. Is that the seamanlike way to do? A. Yes.

Q. Did you or did you not find any ratlins loose about the deck after this? A. No.

Q. Did you have any turned in to you by any of the sailors? A. No.

Q. Or other men aboard the ship? A. No.

Q. How was the ship equipped on this voyage?

A. She was well equipped.

Q. How was your supply of cordage?

A. She had an ample supply of everything.

Q. Of ropes? A. Yes.

Q. Marline? A. Yes.

Cross-examination.

Mr. THACHER.—Q. Mr. Silow, how old are you?

A. 27.

Q. You are 27? A. Yes.

Q. So that at that time you were 25? A. Yes.

Q. Had you ever been a boatswain before?

A. No.

Q. That was the first time you had ever been a boatswain? A. Yes.

Q. And you began your life, your career, as a boatswain the day before this accident?

A. Two days before that.

Q. Had you ever been on the "Senator" before?

A. Yes.

Q. How long before?

A. Seven years before that.

Q. But not in the period between the seven-year period? A. No.

(Testimony of Oscar Silow.)

Q. Until two days before the accident?

A. Yes.

Q. Do you remember being ordered by the mate to have the sail brought down? A. Yes.

Q. Why were you ordered to do that?

A. The captain wanted it down, wanted it taken down and sent ashore to be repaired.

Q. And the mate ordered you to have it brought down? A. Yes.

Q. The mate, as I understand it, gave his orders to you and then you passed them on to the seamen?

A. Yes. [135]

Q. That is the way it worked out? A. Yes.

Q. What were you doing with that sail before Hokanson went up?

A. We were trying to take it down.

Q. You were trying to take it down?

A. Yes.

Q. How did you try to take it down?

A. We tried by letting the halyard go.

Q. That would not work? A. No.

Q. So a man had to go up aloft? A. Yes.

Q. Who was working on that job with you—Anderson, Gunderson?

A. There was Anderson, Gunderson.

Q. Martin was there? A. Who is Martin?

Q. He was the cabin boy who testified this morning, the deck boy. A. Oh, yes.

Q. The fellow with curly hair?

A. Yes, he was there.

Q. Anderson, Gunderson, yourself? A. Yes.

(Testimony of Oscar Silow.)

Q. Martin and Hokanson? A. Yes.

Q. You five were the men who were engaged in lowering that sail, or attempting to lower it?

A. Yes.

Q. You found that you could not have it brought down from the deck; you could not haul it down from the deck? A. Haul it down on deck, no.

Q. You could not bring it down on deck, so somebody had to go up aloft? A. Yes.

Q. Where were you working when you found that someone would have to go up aloft?

A. Right there on the sail.

Q. Right there on the sail? A. Yes.

Q. Was not Hokanson working beside you?

A. Yes, he was working beside me.

Q. He was working beside you? A. Yes.

Q. Did you see him go over to the shrouds?

A. Yes. [136]

Q. Did you know what he was doing?

A. I did not realize what he was doing before then, but then I knew what he was going to do when he went up on the shrouds.

Q. You knew when you saw him go over there that someone had to go up the shrouds to let the sail down, didn't you? A. Yes, I did.

Q. And he went up the shrouds, and you were pulling on the sail, weren't you?

A. No, we were not pulling on the sail then.

Q. You were not pulling on the sail then?

A. No.

(Testimony of Oscar Silow.)

Q. What were you doing?

A. We were waiting for the man to get up there, so that we could get it down.

Q. Are you sure that you and Gunderson were not working on the sail?

A. No, we were waiting for Hokanson to get up there.

Q. So that he could kick it loose?

A. Yes, and give it a start.

Q. That was the trouble, that the hank was stuck in the jackstaff? A. Yes.

Q. Someone had to go up there and loosen it up?

A. Yes.

Q. You remember, don't you, that he went up there on the outside of the shrouds? A. Yes.

Q. And he tried to get her loose from the outside?

A. He could not reach it from the outside.

Q. You remember he tried to loosen it from the outside?

A. He may have tried it, but he could not reach it from there; I don't see how he could try, when he could not reach it.

Q. He might have tried?

A. He might have tried.

Q. You did not see him try? A. No.

Q. Then you were not watching him at the time?

A. Yes, I was watching him all the time.

Q. But if he tried, you don't know whether he tried or not?

A. I don't see how he could try from the outside

(Testimony of Oscar Silow.)

when he could not reach the sail. [137]

Q. You were standing where with reference to the shrouds, Mr. Silow?

A. I am standing eight ratlins down there.

Mr. GRIFFITHS.—What are you referring to now, Mr. Thacher? Will you identify the exhibit?

Mr. THACHER.—I am referring to when he was standing down below when Hokanson was up aloft. Where were you standing when Hokanson went up?

A. On deck, right underneath.

Q. You were standing right underneath?

A. Yes.

Q. You had been pulling on the sail? A. Yes.

Q. You were standing, then, within arms' length of the sail? A. Yes.

Q. You were standing so that the sail was right where you could reach it at the time? A. Yes.

Q. And you saw, you stated, when he got aloft, didn't you? A. Yes.

Q. You saw him go around to the inside?

A. Yes, go around to the inside.

Q. You saw him kick?

A. Yes; he swung out from the rigging, out to the sail.

Q. You said something about his standing on the eighth ratlin; you don't know he was standing on the eighth ratlin, do you?

A. Yes, because I could see the distance there myself afterwards; you could not get the sail any higher—if he stood any higher, he could not reach the head of the sail.

(Testimony of Oscar Silow.)

Q. Didn't the sail come down at the same time that he did?

A. Yes, the sail gave way just a little, and he fell then.

Q. Didn't the sail have to give way? A. No.

Q. Then the sail was up after he fell?

A. Yes, it just came down a little.

Q. The sail was still up after the fall?

A. Yes, it was still up.

Q. Then the way in which you reach it that he was standing on the [138] eighth ratlin was that the sail gave way when he was standing on it?

A. Yes.

Q. And then afterwards you looked up and saw where the top of the sail was and you made up your mind that he must have been on the eighth ratlin?

A. He must have been on the eight ratlin, because the sail could not go any higher.

Q. It could not go any higher?

A. No, the sail goes as high as the eighth ratlin.

Q. Then the only way that you know whether he was standing on the eighth ratlin is by the fact where you think the sail was? A. Yes.

Q. That is how you know it was the eighth ratlin?

A. Yes.

Q. That is the only way you know it, isn't it?

A. That is the only way; you can't get it any higher.

Q. How far did the sail give way?

A. About a foot, around a foot.

Q. How do you know it was a foot?

(Testimony of Oscar Silow.)

A. I saw that afterwards again; I saw it only gave a foot.

Q. You testified that you were standing so that you could touch the sail with your hands when he was aloft? A. Down on deck, yes.

Q. So that Hokanson was, when he was up toward the eyes of the rigging, directly above you, wasn't he? A. Yes.

Q. What were these men that were with you doing?

A. They were waiting for the sail to get a start to come down.

Q. They were not doing anything? A. No.

Q. Just standing around? A. Yes.

Q. They were not trying to assist Hokanson in lowering the sail? A. They could not assist.

Q. You might have pulled on the sail, might you not? A. It was jambed up aloft.

Q. I know it was jambed, but you could pull from one end as well [139] as the other, and the four of you were standing right around the bottom of the lower part of the sail, weren't you? A. Yes.

Q. I suppose after the sail had only given way a foot, someone else went up and he kicked that sail loose?

A. No, we got it adrift then; we got it away from the hank and got it down that way.

Q. What was the matter with the hanks?

A. They were jambed on the jackstaff.

Q. They were not very well greased, were they?

(Testimony of Oscar Silow.)

A. No.

Q. Rusted? A. Must have been.

Q. Not oiled? A. No, they never do get oil.

Q. Or grease?

A. They don't need to get grease, either.

Q. So they were rusted, they were all of that?

A. No, they could not rust, neither, they were painted.

Q. Here is the answer in this case, Mr. Silow; you may have seen it. A. No, I have not.

Q. Sworn to by Mr. Towle, secretary of your company. He says that "said libelant carelessly and negligently and in an unseamanlike manner removed both feet from said ratlins and by holding onto one of said shrouds with one hand only, swung himself bodily away from said shrouds and said ratlins and jumped on to said trysail with both feet." As I understand it, you testify that he jumped on this with both feet? A. Yes, I do.

Q. And with only one hand holding on to the shrouds? A. Two hands, I testified to two hands.

Q. He held on with two hands? A. Yes.

Q. And he jumped to a position which was about five feet away from where he had hold with his hands? A. Yes.

Q. And 40-odd feet above the deck? A. Yes.

Q. And he had simply hold of the shrouds?

A. Yes.

Q. Now, tell me, what are these shrouds made of?

A. Wire. [140]

Q. They are made out of wire? A. Yes.

(Testimony of Oscar Silow.)

Q. Have they got anything on the wire?

A. No.

Q. Just plain, simple wire?

A. Just plain, simple wire.

Q. How thick are they?

A. About an inch and a half in diameter, or an inch and a quarter, maybe they are; I don't know the exact size.

Q. Did you ever see anybody do such a thing as that before in your life? A. Yes.

Q. What, jump with both feet?

A. I have done it myself.

Q. You have done it with yourself? A. Yes.

Q. When you were at sea? A. Yes, at sea.

Q. What do you mean by jumping on the trysail?

A. Well, to make a jump from the ratlins, we will say on the after part of the shrouds, I can just have one foot on the ratlins, and then I can just swing my two feet right on to the head of the sail and hold on with my hands.

Q. What do you mean by swinging your two feet?

A. Swinging the whole weight of my body out to the head of the sail, as long as I hold on with my hands.

Q. And then holding on to this wire rope?

A. Yes.

Q. Which is an inch and a half in diameter?

A. Yes.

Q. You invariably have the sail give on you, go down, don't you? A. Yes.

Q. And then you dangle in the air?

(Testimony of Oscar Silow.)

A. No; you can swing back to the rigging again.

Q. Then you swing back?

A. You swing back to the rigging again.

Q. As a matter of fact, you swing some eight feet, don't you—I mean to say your feet on the ratlins would be eight feet from your feet on the sail?

A. It would not be eight feet away from the sail; I could not reach it then. [141]

Q. You would be five feet?

A. Well, hardly five feet.

Q. The distance between there and there (illustrating)? A. Yes.

Q. How long did you stay on the "Senator"?

A. At that time, I stayed there about three months; I have been on her off and on ever since.

Q. When did you have the trysail up again?

A. About seven or eight months afterwards.

Q. There is a great deal of smoke that goes through that rigging, is there not? A. Yes.

Q. You burn coal? A. Yes.

Q. This soft lignite coal, you call it, don't you?

A. I don't know what they call it.

Q. But it is the cheap coal that comes from the north? A. I don't know the price of it.

Q. It is a sort of bitumen?

Mr. GRIFFITHS.—He says he does not know, Mr. Thacher.

Mr. THACHER.—Q. You know that it was soft coal, don't you?

A. It is soft coal; some of it is soft and some of it

(Testimony of Oscar Silow.)

is lumped; I don't know the quality, nor the price.

Q. Where did you get it? A. Seattle.

Q. You know that thick smoke pours through this rigging? A. Yes.

Q. And sparks very frequently fly from the smoke-stack, don't they? A. Yes, quite frequently.

Q. What is your position on her now?

A. I was boatswain on her.

Q. You are boatswain on her?

A. I was taken off in Seattle.

Q. What is your present position? A. None.

Q. How soon after Hokanson went up did this sail give way?

A. After he went up it gave instantly, as soon as he jumped onto it.

Q. As soon as he got up there, he jumped right onto it? A. Yes.

Q. Didn't wait a minute? A. No. [142]

Q. That is quite an acrobatic feat, isn't it, to do that? A. I don't know.

Mr. GRIFFITHS.—I object to that.

A. (Continuing.) I don't think that it is very acrobatic for a sailor, particularly for a man of my age, anyway.

Mr. THACHER.—Q. But it would be for an older man? A. He is a good man, too.

Q. He was a very good man, was he not?

A. All right.

Q. Wasn't he very active?

A. He was active for a man of his age.

(Testimony of Oscar Silow.)

Q. As soon as he went up, he jumped onto the sail. How did he get over there on top of that sail, Mr. Silow?

A. How I get over there—that is very easy.

Q. Show me.

A. Shall I show you on the picture?

Q. Yes, show it to us on the picture.

A. Well, I am standing here on the rigging.

Mr. GRIFFITHS.—Identify that exhibit, will you please, Mr. Thacher; I want that to be clear.

Mr. THACHER.—This is marked “C” on the back, and is exhibit “D.”

A. When I am standing out on the rigging here, I just take hold of it the way I have got hold of it there, and with the rigging up there like that, if I let go and swing, I will hang up and down; and when I let go I swing over.

Q. You mean you sort of take your hands and, holding onto that, you swing your whole body over?

A. Yes.

Q. A distance of five feet?

A. It is about five feet; the distance is about five feet.

Q. You say that afterwards you examined the ratlins at the top and some of them were in very poor shape? A. Yes.

Q. What was the matter with them?

A. Part of them was gone.

Q. Part of them was gone? A. Yes. [143]

Q. Burned out, weren't they?

(Testimony of Oscar Silow.)

A. Rusted off; they could not very well burn; iron could not very well burn off.

Q. I understand, but the heat which poured from the funnel would necessarily deteriorate your iron, wouldn't it?

A. No, it would not be that hot; it would not cause it to heat that far aft.

Q. But at the same time the ratlins there were rusted, many of them—several of them?

A. They were all rusted more or less, I guess.

Q. They were all rusted more or less? A. Yes.

Q. You are ready to subscribe that some of these top ratlins were in very poor shape? A. Yes.

Q. What did you mean by saying that the ship had a supply of cordage; did you mean to say she had the ordinary rope and so forth on board? A. Yes.

Mr. GRIFFITHS.—What do you mean by your question; I do not understand it; he testified she was amply equipped with cordage.

Mr. THACHER.—Q. When you say that she was amply equipped with cordage you simply mean that she had twine enough and rope enough to meet her ordinary exigencies, don't you? A. Yes.

Q. She was like any other ship? A. Yes.

Q. So that all that you know about this was that she was in the kind of condition that any ship is, that is to say, as to her having cordage enough she was like any other ship? A. Yes.

Mr. GRIFFITHS.—What do you mean by "any other ship"; there might be a different supply on various ships.

(Testimony of Oscar Silow.)

Mr. THACHER.—Just an ordinary supply.

Mr. GRIFFITHS.—What do you mean by an ordinary supply?

Mr. THACHER.—One that would not be so very much below the average; that she was fitted out with ropes, so that if the ropes broke they could put in new ropes, and patch her sails and so on. [144]

Mr. GRIFFITHS.—Do you contend he could not get cordage on board that ship?

Mr. THACHER.—I doubt if there is ever a ship leaves port where they would not have sufficient rope, sufficient cordage to patch a thing in an accident.

Mr. GRIFFITHS.—Then, if your Honor please, I object to this line of inquiry as having no point or purpose.

Mr. THACHER.—I won't press it.

Q. You were standing right at the bottom of the sail, weren't you?

A. At the time Hokanson fell?

Q. At the time Hokanson fell, yes.

Q. From the moment that he went up to the time that he fell, you were standing there? A. Yes.

Q. You were standing on which side of the mast?

A. On the port side.

Q. On the port side? A. Yes.

Q. How much sea was there on?

A. There was practically no sea; there was a little swell running.

Q. A little swell? A. A little swell.

Q. A little breeze? A. Very little.

(Testimony of Oscar Silow.)

Q. Suppose the sail had come down all of a sudden, would that sail have struck you?

A. No, it could not.

Q. Why?

A. It would have stayed on the jackstaff.

Q. When was the first thing you knew about Hokanson falling? A. I saw him falling.

Q. You saw him falling? A. Yes.

Q. What did he fall to?

A. He fell down on the after hatch, on No. 3 hatch.

Q. He was right over you, wasn't he? A. Yes.

Q. How far was No. 3 hatch from you?

A. It would be about four [145] or five feet abaft me.

Q. He did not fall down any closer to you, did he?

A. No; that is on a different deck, too, where he fell.

Redirect Examination.

Mr. GRIFFITHS.—Q. Mr. Silow, I just want you to state again where the ratlins were which you stated were in poor condition; which ratlins were those?

A. Three and four.

Q. You are certain there were not any in poor condition lower than the fourth? A. Yes.

Q. There were none in poor condition below the fourth? A. No.

Mr. THACHER.—The third and fourth ratlins, as I understand it, were in this bad shape that you speak of? A. Yes.

Q. And the seizings were in bad shape, weren't they?

(Testimony of Oscar Silow.)

A. There were pieces of ratlins gone, pieces of the middle of the ratlin gone on the third and fourth.

Q. How soon after the accident did you go up the shrouds?

A. About five minutes afterwards; it was not over five minutes afterwards.

Q. That was after the captain had gone aft?

A. Yes.

Q. You went up right away and came right down, did you? A. Yes.

Mr. GRIFFITHS.—Q. I just want to ask you now, is your recollection perfectly clear that you went up after the captain came aft? A. Yes.

Q. Do you remember distinctly the captain coming aft before you went aloft?

A. The captain came back and we brought Hokanson to social hall and I went aloft.

Q. After you went into social hall? A. Yes.

Mr. THACHER.—That was some ten or fifteen minutes after the fall, was it not?

A. No, I do not think it was.

Q. How long would you say that he laid on deck?

A. I could not [146] say exactly; it was not very long, anyway.

Q. The sail was still up when you went up?

A. Yes, it was still up.

Testimony of E. Shorensen, for Respondent.

E. SHORENSEN, called for Respondent, Sworn.

Mr. GRIFFITHS.—Q. What papers do you hold, Mr. Shorensen? A. Master's papers unlimited.

(Testimony of E. Shorenson.)

Q. What papers did you hold on December 10, 1913? A. Chief mate's papers.

Q. On what vessel, if any, were you at that time, on December 10, 1913—on what ship were you?

A. On the steamer "Senator."

Q. In what capacity? A. Chief mate.

Q. Did you see this accident to Mr. Hokanson on that day?

A. No, I did not; I did not see him fall.

Q. When did you first see him, if at all?

A. On No. 3 hatch, after he had fallen down.

Q. What were you doing then?

A. Well, I was coming along the deck from forward.

Q. Did you or did you not actually see him fall or hit the hatch?

A. No, I did not see him fall; I did not see him hit.

Q. How soon thereafter did you see him?

A. Just as he landed, I just came around the corner when he fell there.

Q. What did you do then, Mr. Shorenson?

A. Well, I went over to see what was the matter with him, and I got a mattress, sent for a mattress, put him on the mattress, and we packed him into social hall.

Q. Then what did you do next?

A. Well, we left him there in the social hall on the mattress, and left a man there with him, one of the sailors. [147]

Q. Did you give that man any instructions?

(Testimony of E. Shorensen.)

A. Yes, I told him that if there was anything that he wanted, or anything he could do, to let me know.

Q. Then what did you do?

A. Then I went out on deck; I had to get the anchor ready, to let go the anchor when we got into Neah Bay.

Q. That is, your ship put about for Neah Bay?

A. Yes, we turned about right away.

Q. When did the man leave the ship, and under what circumstances?

A. When we came into Neah Bay, the life-saving boat came out with a doctor.

Q. Did you put Hokanson on board?

A. Yes, we put him on this life-saving boat and sent him ashore.

Q. How was he lowered?

A. We put him in one of our boats first on the deck, and then lowered our boat down to a level with the other one and put him aboard.

Q. What are the ratlins on the ship made of?

A. Pipe, iron pipe.

Q. Iron pipe, how thick?

A. I guess about half an inch.

Q. Can you burn them through by smoke from your stack? A. No.

Q. How far away is the smokestack from the main-mast? A. About 35 feet.

Q. How was the "Senator" equipped on this voyage, with respect, for instance, to cordage?

A. We had plenty of everything.

(Testimony of E. Shorenson.)

Q. Marlin? A. Marlin and rope.

Q. No shortage? A. No shortage of any kind.

Q. What sail was it that was furled up alongside the mainmast? A. The trysail.

Q. When it is hoisted aloft and furled in that way, is it or is it not always hoisted to the same height?

A. It is always at the same height.

Q. A standard height when it is furled?

A. Yes. [148]

Cross-examination.

Mr. THACHER.—Had you been on the “Senator” on her Nome trip? A. Not that year, no.

Q. When did you go on, in December, 1913?

A. I came on about eight days before the accident happened.

Q. Where did you go on from, what ship?

A. From the “President.”

Q. You came on her from the “President,” too?

A. Yes.

Q. When you came on the “Senator,” was the ship pretty well deserted?

A. Well, there were some men working on her.

Q. How long had she been down from Nome then?

A. About a month.

Q. Lying up? A. Lying up.

Q. You say the mainmast was about 35 feet from the stack? A. About.

Q. There is a great deal of smoke goes through that rigging up there, isn't there?

A. There is a certain amount, yes, at times, when

(Testimony of E. Shorenson.)

the wind is right ahead.

Q. And sparks? A. Not very many sparks.

Q. But some? A. Sometimes.

Q. What effect does it have on the seizins; it burns them, does it not?

A. The seizings, yes, sometimes; it will take a long time before you will burn a seizing with smoke.

Q. It all depends on how many sparks there are?

A. Very few sparks go through there.

Q. The effect on the iron is just like the effect of smoke on iron, that is to say, there is a certain amount of moisture and rust results?

A. Well, if you left it up there long enough it might.

Q. It has that effect? A. Some effect, yes.

Q. Slight? A. Yes.

Q. Did you order them to get the sail down when you came aft? A. To get it down? [149]

Q. Yes. A. No.

Q. Wasn't it up when you came aft? A. Yes.

Q. When Hokanson had fallen?

A. It was up there.

Q. Wasn't the sail down when Hokanson had fallen? A. No, it was not down altogether.

Q. How far down was it?

A. Well, I did not pay any special attention to that, at the time.

Q. It was pretty well down, was it not?

Mr. GRIFFITHS.—He said he did not notice. I don't want you to lead him into any statements by

(Testimony of E. Shorenson.)

your testimony; he said he did not notice the condition of the sail.

Mr. THACHER.—He said he did not notice it particularly.

Mr. GRIFFITHS.—He said he did not notice particularly, therefore, how is he going to say how far down that sail was. He was taking care of the man.

Mr. THACHER.—He might have some idea about it.

A. No, I could not say; I was busy with Hokanson, getting him into social hall.

Q. You don't know anything about the sail, then?

A. No.

Q. What its position was, at all?

A. No, not at the time.

Q. Or afterwards?

A. No. The sail was taken down that day.

Q. You say there was lots of cordage, rope?

A. Yes.

Q. You were fixed up the way you ordinarily are going up there? A. Yes.

Q. No more and no less? A. Just the same.

Q. Had you been on the "Senator" before this?

A. No, this was my first time.

Q. This was your first trip. How long did you stay on the "Senator"? A. After the accident?

Q. Yes. A. A couple of months. [150]

Q. Have you been on her since? A. Yes.

Q. On and off? A. Yes.

Q. How soon did you get the trysail back again

(Testimony of E. Shorenson.)

after it was taken down that time?

A. Got it back, you say?

Q. I mean to say, wasn't it put up some months afterwards? A. Some months afterwards, yes.

Q. What had been done to it in the meantime?

A. It had been placed in the sail locker.

Q. Do you know what changes had been made?

A. Some new canvas put in it.

Q. You don't know exactly what had been done to it? A. No, I don't know exactly.

Q. How about these blocks; weren't these blocks shifted between the time the sail was taken down and put up? A. The blocks shifted?

Q. Yes, these blocks here (pointing)? A. No.

Q. How do you know; are you sure?

A. Sure; they are in a fixed position always.

Q. But you don't know what was done to the sail?

A. No.

Q. When you say that the sail goes up to a certain point, you mean that as you noticed the sail as it was furled up, that it was generally furled up to a certain point, don't you?

A. Yes, I know it goes to a certain point.

Q. Haven't you ever seen it any lower than that point? A. Not when it is made fast, no.

Q. But this was the sail which had been renovated and made over,—it had been cut over? A. No.

Q. Are you sure? A. Sure.

Q. You are sure that it was not cut over?

A. Yes; there was no new roping in it; if there

(Testimony of E. Shorenson.)

was new roping, it would be the same length. [151]

Q. That is the way you make up your mind as to what was done? A. Yes.

Q. But you don't know?

A. Well, I know there was not new roping put in it; the sail was the same size.

Q. Do you know anything about how the sail was lowered after Hokanson was hurt?

A. No, I don't.

Q. Who are you employed by now?

A. The Pacific Coast Steamship Company.

Mr. GRIFFITHS.—If your Honor please, I have no more witnesses to offer, but I wish at this time to make an amendment in our answer on page 7, and in the second affirmative defense, in line 11, by striking out the words “with one hand only”; of course it is a well-settled rule in admiralty that a mere technical variance is not of any material importance; in any event, it is simply to make the situation clear; I wish to strike out those words.

The COURT.—“With one hand only”?

Mr. GRIFFITHS.—Yes. I am perfectly willing to admit that he had hold of the shrouds with two hands.

The COURT.—Any objection to that?

Mr. THACHER.—No.

Testimony of Axel Hokanson, for Libelant (Recalled in Rebuttal).

AXEL HOKANSON, the libelant; recalled in rebuttal.

(Testimony of Axel Hokanson.)

Mr. THACHER.—I simply want to ask you one question: How old were you at the time of the accident? A. 58.

Q. What did your family consist of at the time of the accident? How many were there in your family?

A. There is me and my wife and two children.

Q. The children, are they both under 21 or over 21?

A. One is 18 and one is 21. [152]

Q. Now, or then? A. Now.

(Thereupon the case was submitted on briefs, 10, 10 and 5.)

[Endorsed]: Filed Oct. 15, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [153]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY —No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corp. et al.,
Respondents.

(Opinion and Order to Enter a Decree in Favor of Libelant for the Sum of \$6,500.)

THOMAS A. THACHER, Esq., and DENMAN
and ARNOLD, Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD, Proc-
tors for Respondents.

Libelant was injured by falling from the shrouds of the steamer "Senator" on December 10th, 1913. He claims that the cause of his fall was the breaking of a ratline on which one of his feet was resting, while with the other he was endeavoring to kick loose a sail which they were trying to lower. Respondents claim that the fall was due to his own carelessness in swinging out from the shrouds with both feet to jump on the sail, which gave way under him, thus breaking his handhold on the shrouds and precipitating him to the deck. At the trial libelant was permitted to introduce testimony to the effect that immediately after his fall, and while still lying on the deck he stated that the accident was due to the breaking of a ratline under his foot and that everything was rotten up there. This testimony was admitted, not for the purpose of corroborating the testimony of libelant given at the trial, but solely to show that the ship, through the boatswain, had immediate notice that libelant attributed the accident to fault in the rigging, so that the condition of the rigging might have been thoroughly investigated. The only witness to the condition of the rigging pro-
[154] duced by respondents was the boatswain

who, as claimed by libelant, ordered him aloft. It is not very material whether or no the boatswain did order libelant to go aloft and loosen the sail, except that the boatswain's denial of the fact in the face of the testimony of all the other witnesses present at the time tends to throw discredit upon the other and more material portions of his testimony as to the condition in which he found the rigging when he went aloft shortly after the accident. Libelant was an experienced seaman, and a very candid witness; and I accept his statement as to how the accident occurred. The ship was bound to furnish him with a safe place in which to work. A ratline which gives way under the weight of a seaman who is performing a duty which requires it to support him is not such a safe place.

A decree will be entered in favor of libelant, and because of the serious and permanent nature of his injuries, and the extent of his suffering, such decree will be for the sum of \$6,500.

June 5th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 5, 1916. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [155]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

PACIFIC COAST COMPANY, a Corporation, and
PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Final Decree as to Pacific Coast Steamship Company.

Issue being joined herein, and this course coming on duly to be heard upon the pleadings and proofs adduced by the respective parties, the libelant, Axel Hokanson, being represented by his proctors, Thomas A. Thacher and Messrs. Denman and Arnold, and the respondents, Pacific Coast Company, a corporation, and Pacific Coast Steamship Company, a corporation, being represented by their proctors, Ira A. Campbell and Messrs. McCutchen, Olney & Willard;

And it appearing *inter alia* to the Court that libelant was an experienced sailor and was employed as a sailor by the Pacific Coast Steamship Company, and was injured on December 10, 1913, while in the proper discharge of his duties as said sailor in said employ, on the steamship "Senator," a ship oper-

ated and controlled by said Pacific Coast Steamship Company, because of the unseaworthiness of said steamship "Senator" from the beginning of the voyage on which libelant was injured to the time of said injury, and because of the failure of Pacific Coast Steamship Company to supply and keep in order from the beginning of the voyage on which libelant [156] was injured to the time of said injury, the proper appliances appurtenant to the said steamship "Senator,"

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said libelant, Axel Hokanson, recover against said Pacific Coast Steamship Company the sum of Six Thousand, Five Hundred Dollars (6,500), together with his costs to be taxed and interest from the date of this decree upon said sum of Six Thousand, Five Hundred Dollars (\$6,500) at the rate of seven (7) per cent per annum until said recovery is paid; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, unless an appeal be taken from this decree within the time limited by the rules and practice of this Court, the stipulators for costs on the part of the respondent Pacific Coast Steamship Company shall cause the engagements of its stipulations to be performed, or show cause, within four (4) days after the expiration of the time to appeal, or on the first day of jurisdiction thereafter.

Dated June 30th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 30, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [157]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libellant,

vs.

THE PACIFIC COAST COMPANY, a Cor-
poration, and PACIFIC COAST STEAM-
SHIP COMPANY, a Corporation,

Respondents.

Notice of Appeal.

To Thomas A. Thacher, Esquire, and to Messers.
Denman and Arnold, Proctors for Libellant; and
to W. B. Maling, Esquire, Clerk of the Above-
entitled Court:

Please take notice that Pacific Coast Steamship
Company, a corporation, one of the respondents
above named hereby appeals from the final decree
made and entered herein as to it, the said Pacific
Coast Steamship Company, on the 30th day of June,
1916, and from each and every part of said decree,
to the next United States Circuit Court of Appeals
for the Ninth Circuit to be holden in and for said
circuit at the City and County of San Francisco,
State of California.

Dated San Francisco, California, July 10, 1916.

IRA A. CAMPBELL,
McCUTCHEM, OLNEY & WILLARD,
Proctors for said Respondent and Appellant, Pacific
Coast Steamship Company.

Service of the within Notice of Appeal and receipt
of a copy is hereby admitted this 10th day of July,
1916.

THOMAS A. THACHER.
DENMAN & ARNOLD.

[Endorsed]: Filed Jul. 10, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [158]

*In the United States District Court for the North-
ern District of California, First Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

THE PACIFIC COAST COMPANY, a Corporation,
and PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Assignment of Errors.

Comes now Pacific Coast Steamship Company,
respondent and appellant herein, and says that in the
record, opinion and decision in this case and in the
final decree as to it, the said Pacific Coast Steamship
Company, dated June 30, 1916, there is manifest and

material error, and said appellant now makes, files and presents the following assignment of errors on which it relies, to wit:

(1) That the District Court erred in entering the final decree herein as to Pacific Coast Steamship Company, dated June 30, 1916, ordering, adjudging and decreeing that said libelant, Axel Hokanson, recover against said Pacific Coast Steamship Company the sum of six thousand five hundred (6,500) dollars, together with costs to be taxed, and interest from the date of this decree upon said sum of six thousand five hundred (6,500) dollars at the rate of seven (7) per cent [159] per annum until said recovery is paid;

(2) That the District Court erred in not holding and deciding that this respondent (appellant) Pacific Coast Steamship Company, was entitled, under the pleadings and evidence adduced, to a decree of dismissal herein, with its costs, as prayed for in its answer filed herein;

(3) That the damages awarded by the District Court to libelant by the aforesaid decree as to Pacific Coast Steamship Company, dated June 30, 1916, to wit, the sum of six thousand five hundred (6,500) dollars, were excessive;

(4) That the District Court erred in holding that libelant's (appellee's) fall was due to the breaking of a ratline beneath his foot;

(5) That the District Court erred in holding that the ratline gave way beneath libelant's (appellee's) foot, or at all;

(6) That the District Court erred in not holding that libelant's (appellee's) fall was due to his own carelessness in swinging out from the shrouds with both feet to jump on the mainsail;

(7) That the District Court erred in holding that respondent (appellant) was bound to furnish libelant (appellee) with a safe place in which to work, and in not holding that the only duty of respondent (appellant) in the premises was to exercise due diligence to provide libelant (appellee) with a safe place in which to work;

(8) That the District Court erred in not holding and deciding that said steamer "Senator" was at the commencement of [160] the voyage in question fully and properly manned by competent officers and crew, and was fully equipped and supplied with all of the extra gear, ropes, cordage, rods, parts, supplies and equipment necessary to maintain her in an efficient and seaworthy condition, and that, if the sails or shrouds or ratlines of said vessel were not kept and maintained in a sound and seaworthy condition, such condition was caused by the neglect of the officers and crew of said vessel to use the gear, ropes, cordage, rods, parts, supplies and equipment on board of said vessel, with which said sail, said shrouds and said ratlines could have been maintained in an efficient and seaworthy state.

In order that the foregoing assignment of errors may be and appear of record, said appellant, Pacific Coast Steamship Company, files and presents the same, and prays that such disposition be made there-

of as in accordance with the law and statutes of the United States in such cases made and provided; and said appellant prays that the aforesaid decree as to it, said Pacific Coast Steamship Company, dated June 30, 1916, be set aside and held for naught, and that the court below be instructed to enter a decree of dismissal in its favor, and for its costs incurred upon this appeal and in the court below, and that, in the event the aforesaid decree be not set aside, the damages therein be reduced, and that appellant may have such other and further relief as shall be deemed meet and equitable in the premises.

Dated August 16th, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent and Appellant, Pacific Coast Steamship Company. [161]

Service of the within Assignment of Errors and receipt of a copy is hereby admitted this 21st day of August, 1916.

T. A. THACHER,

DENMAN & ARNOLD,

Proctors for Libellant.

[Endorsed]: Filed Aug. 19, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [162]

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,773.

AXEL HOKANSON,

Libelant,

vs.

THE PACIFIC COAST COMPANY, a Corporation,
and PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

Stipulation (And Order Re Exhibits).

IT IS HEREBY STIPULATED AND AGREED
by and between the parties hereto that all of the
exhibits introduced in the depositions taken before
the Commissioner in the above-entitled case, and
the exhibits introduced at the hearing before the
above-entitled court may be sent up to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit as original exhibits for the apostles on appeal
and need not be printed in said court of appeals.

THOMAS A. THACHER,

DENMAN & ARNOLD,

Proctors for Libelant.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondents.

It is so ordered.

WM. W. MORROW,

District Judge.

[Endorsed]: Filed Aug. 9, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [163]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, W. B. Maling Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 163 pages, numbered from 1 to 163, inclusive, to contain a full, true and correct Transcript of certain records and proceedings, in the case of Axel Hokanson vs. Pacific Coast Company, a Corp., et al., No. 15,773, as the same now remain on file and of record in this office; said Transcript having been prepared pursuant to and in accordance with "Praeceptum for Apostles on Appeal" (copy of which is embodied in this transcript), and the instructions of the attorneys for respondents and appellants.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of seventy-six Dollars and Sixty Cents (\$76.60), and that the same has been paid to me by the attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said District Court this 1st day of Sept., A. D. 1916.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
9/1/16. C. W. C.] [164]

[Endorsed]: No. 2857. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Steamship Company, a Corporation, Appellant, vs. Axel Hokanson, Appellee, Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed September 1, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. —.

AXEL HOKANSON,

Libelant,

vs.

THE PACIFIC COAST COMPANY, a Corporation,
and PACIFIC COAST STEAMSHIP COM-
PANY, a Corporation,

Respondents.

**Stipulation and Order Extending Time for Docketing
Cause on Appeal.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
time for printing the record and filing and docketing
ing this cause on appeal in the United States Circuit
Court of Appeals for the Ninth Circuit may be, and

the same is hereby, extended to and including the first day of September, 1916, it being agreed said cause will be heard during the October, 1916, term.

Dated, San Francisco, California, August 5, 1916.

THOMAS THACHER,

DENMAN & ARNOLD,

Proctors for Libelants.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondents.

It is so ordered by the court.

WM. W. MORROW,

Circuit Judge.

Dated, August 5, 1916.

[Endorsed]: No. 2857. United States Circuit Court of Appeals for the Ninth Circuit. Alex Hokanson, Libellant, vs. The Pacific Coast Company, a Corporation, and Pacific Coast Steamship Company, a Corporation, Respondents. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Aug. 5, 1916. F. D. Monckton, Clerk. Refiled Sep. 1, 1916. F. D. Monckton, Clerk.

No. 2867

IN THE

United States Circuit Court of Appeals

Ninth Circuit

WILLIAM O'BRIEN,
Plaintiff in Error,
vs.
LAS VEGAS AND TONOPAH
RAILROAD COMPANY,
(a Corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

A. GRANT MILLER
Attorney for Plaintiff in Error

Filed this *day of*, 1917.

FRANK D. MONCKTON, Clerk.

Filed

By

FEB 28 1917

Deputy Clerk.

F. D. Monckton,
Clerk.

No. 2867

IN THE
United States Circuit Court of Appeals
Ninth Circuit

WILLIAM O'BRIEN,	}
Plaintiff in Error,	
vs.	
LAS VEGAS AND TONOPAH RAILROAD COMPANY,	
(a Corporation), Defendant in Error.	

BRIEF FOR PLAINTIFF IN ERROR

I.

GENERAL STATEMENT OF THE CASE

This Writ of Error is prosecuted from a judgment of the United States District Court, for the District of Nevada.

It is sought to review the judgment of that Court entered pursuant to the verdict of a jury, in favor of Defendant in Error. The complaint of Plaintiff in Error alleged that he was in the employ of the Defendant in Error on the 2nd day of July, 1913, as a carpenter, on the railroad of the Defendant in Error and was instructed to work in the repairing

of a certain bridge situated about fifteen miles southeast of Bonnie Clare, in the County of Nye, State of Nevada, on the right of way of the said defendant, and by said defendant caused and permitted to travel from said Bonnie Clare to his assigned labor upon a gasoline motor section car, which said gasoline motor section car was defective in that the gasoline drain and tank valve, sometimes called the gasoline feed pipe drain-cock or pet-cock, was so worn and out of repair that it caused and permitted the gasoline from the gasoline tank of said car to escape and fall upon the heated parts or portions of the machinery of the motor of said car, which said defect was known to defendant, its officers, agents and employees, or could have been known to defendant, its officers, agents and employees by proper inspection, whereby the said gasoline became ignited and flamed up, whereupon said plaintiff threw off the spark device and endeavored to stop the said car and while the said plaintiff was in the exercise of ordinary care and without any fault on his part, he, the said plaintiff, was violently thrown from the said gasoline motor section car to the ground, through the negligence and carelessness of the said defendant, its officers, agents and employees while said car was running at the rate of about twelve miles per hour; in consequence of which plaintiff suffered the injuries complained of and asks damages in the sum of \$31,134.00.

The complaint set up also that the Defendant in Error refused to come under the provisions of that

certain Act of the Legislature of the State of Nevada, known as and called "An Act relating to the compensation of injured workmen in the industries of this State and compensation to their dependents where such injuries result in death, creating an Industrial Insurance Commission, providing for the care and disbursement of funds for the compensation and care of workmen injured in the course or employment and defining and regulating the liability of employers to their employees; and repealing all acts and parts of acts in conflict with this Act." Approved March 15, 1913, and acts amendatory thereof; which was admitted by the answer of Defendant in Error.

The answer of Defendant in Error admitted the jurisdictional allegations contained in paragraphs I and II of the complaint; admits that plaintiff was in its employ as alleged in paragraph III of the complaint; admits that it was the duty of the defendant to furnish plaintiff a safe place to work and safe ways, works, machinery and appliances therefor; admits that defendant caused and permitted plaintiff to travel from Bonnie Claire to his assigned labor at said bridge upon a gasoline motor car, and denies generally the other allegations of the complaint.

After the entry of judgment Plaintiff in Error moved for a new trial, which motion was heard in the said United States District Court, and denied; said motion for new trial was upon four grounds, to-wit:

1. That errors of law occurred upon the trial of the said cause, which were excepted to by said plaintiff;

2. That said verdict was against the evidence and contrary to the evidence presented upon said trial;

3. That said verdict was contrary to law;

4. That the Court erred in instructing the jury upon the application of the Nevada Compensation Act or Workmen's Insurance Law, and that such error was the determining factor and caused the jury to return the said verdict in favor of said defendant.

Plaintiff in Error presents the question and contends that the evidence under plaintiff's complaint was complete and conclusive and entitled plaintiff to a verdict; that plaintiff's evidence was not rebutted by defendant in any material point; that the only defenses which defendant had under the law because of its rejection of the Nevada Industrial Insurance Act, was

1. That the plaintiff was intoxicated;

2. That the plaintiff willfully injured himself;

3. That the defendant was guilty of no negligence at all.

There was no evidence whatever to show that plaintiff was intoxicated.

There was no evidence whatever to show that plaintiff willfully injured himself.

There was no evidence to show that the defendant was not guilty of any negligence. And in this connection plaintiff contends that under the law the burden of proving no negligence was upon Defendant in Error, and such proof must be made affirmatively.

Plaintiff in Error also contends that the Trial Court made certain errors and particularly erred in instructing the jury as to the application of law in connection with the Nevada State Industrial Insurance Act.

Plaintiff in Error understands that the granting or denying of a motion for a new trial is in general a discretionary matter with the Court below, and that ordinarily this Court will not review such an order unless **it be manifest** that the order made in relation thereto was and is an abuse of discretion, the denial of the motion for new trial by Plaintiff in Error was and is an abuse of discretion, for the reasons hereinbefore stated, and particularly because of the error of the Trial Court in instructing the jury, and also for the reason that the evidence fully sustained plaintiff's case and there was no evidence on the part of Defendant in Error to rebut it. Further, that the Court's error in instructing the jury upon the application of the Nevada State Insurance Law was and must have been the determining factor in causing the jury to return a verdict in favor of defendant.

TESTIMONY OF WILLIAM O'BRIEN, IN HIS OWN BEHALF

Plaintiff was called as witness in his own behalf and testified in substance that:

I was in the employ of defendant on the 2nd day of July, 1913, as a carpenter near Bonnie Clare, Nevada, got on to the gasoline motor car and started southeast to Bonnie Clare to repair a bridge, leaving Bonnie Clare at a quarter past seven in the morning. There were four Mexicans with me. After I got out about a mile and a half, I heard one of the Mexicans holler "fire" and I threw the spark that connects the wire—threw that off, and commenced to set the brake; just as I did, that Mexican he also grabbed the brake lever to help; then I bent down first on the side back of the seat I was on on the car, and I noticed the gasoline was escaping out of the cylinders; then I reached over to the opposite side, and as the flames shot and flashed up I fell off the car. The car was going east and I first looked on the left side and saw the gasoline escaping and on fire. I tried to close that cock—I could not quite reach it, the gasoline was escaping from this cock here that came from the tank, it had shaken loose. It is called a pet-cock or drain-cock. Probably about one-third or one-half of the amount of gasoline that would go through the cock was escaping. I went off the car when I straightened up; I think setting the brake helped to throw me. The car was going about twelve miles per hour; I was thrown kind of for-

ward and landed in kind of sand. I did not examine this drain-cock or pet-cock before I left Bonnie Clare that morning. I did not observe any oil escaping from the pet-cock before I left Bonnie Clare. The flame seemed to shoot up a foot or a foot and a half as I leaned over I could feel it, caught my hand and I jerked back. I was attempting to close this particular pet-cock but didn't do it, could not reach it. After I struck the ground I put my hands down and got up; I walked about a rod, and, Oh, I had such pain, I thought my back was broke in two; I probably had to walk less than a rod to the car and I threw myself over the car that way (illustrating), and told them to run me into Bonnie Clare. "7" I did not know before I was hurt that there was anything at all the matter with that section car which belonged to the Las Vegas & Tonopah Railway, and was used for taking men to and from work and so forth. Before the second of July, 1913, the road master used to come around and look at that (car) once in a while, and it was turned over to me about the tenth of June by J. J. Caughlin the road master. He said he would send me plugs and gasoline and look at the car; he said if anything went wrong with it to let him know; I had to clean the plugs and fill it with gasoline—just oil the bearings around. As I reached over and straightened up I went off the car so quick the first thing I knew I was on the ground; I went off back; that is, I was forward, and it came kind of a whirl; I could feel myself going, and the first thing I knew I was sliding on the ground on

my back; I bent down and threw off the spark first and commenced to set the brake myself; then the Mexican sitting there in front of me grabbed the brake handle; then as soon as he grabbed the brake handle I knew that the car was going to be stopped with his handle; then I bent down to see where the fire was; and I noticed that the gasoline was escaping from the tank; that is, through that cock there; then, that is on the opposite side of the car where I was, and I would have to reach over, and I reached over, and as I reached over, the flame shot up; I straightened up from the flame, then at the same time the brake was being set all the time, and I went off there suddenly, just gave a whirl; I could feel that I gave a roll, and slid right on the ground. I worked for the L. V. & T. steady since May, 1910, until I got hurt. The platform of the gasoline section car was about a couple of inches more than seven feet in and about four feet two or three inches wide across the wood part. There is a space about a foot wide here that is flat on each side, then there is a raise in the center and comes up about sixty inches or so for to sit on. The men sit on the platform and their feet rest on this rail. The man driving the car generally sits back of the brake—that is where I sat; the brake is on the left side of the car; those cars will work either way; it was the left side the way the car was facing that morning; the brake would be at the left side, the way it was going that morning; the Mexicans were sitting around on this raised platform with me; they were sitting side-

ways; the platform on which they sat was about twenty inches wide on the top, maybe two feet; the men sit back to back facing out; driver would naturally sit kind of cornerways to look ahead; the motor is under this platform, located about a direct level with the shaft the wheels go through and about the center of the car; there are two cylinders on this particular car and each one of them is to one side of the center, one on one side of the center, one on the other with a space of about three inches between; the gasoline tank was on the back end of the car; the feed-pipe runs from the gasoline tank over to the cylinder; the gasoline tank had been filled by the Mexicans that morning, I was not with them; I had to go and fix a pump; the Mexicans put the car on the track; I didn't inspect it before I got on it; the car was not in my charge, I just had the running of it; I had nothing to do with repairing the car or anything like that; myself and the Mexicans were the only ones that used the car; it was kept in a house at Bonnie Clare; I did not examine or inspect the car at all that morning; we had travelled about a mile and a half before the Mexican hollered fire, upon a track pretty close to level, going east from Bonnie Clare. The exhaust on the car is right on the back end of the cylinder underneath the platform. The car has four wheels somewhat smaller than the ordinary handcar; the car was made by the Sheffield Car Company of Three Rivers, Michigan.

Q. (By Mr. Whittemore.) It was the standard type of gasoline section-car?

A. At that time it was; that is, the time it was made, I should have said.

When the Mexicans hollered "fire" we were running about twenty miles an hour; the first thing I did after he hollered was to throw off that spark device that stops the engine from working, and commenced to set the brake, that is, the brake lever right there. Then as soon as the Mexican grabbed the brake lever to help me stop the car I bent down to see where the fire was, see on the left side of the car, and I noticed that the gasoline was escaping; I first looked on the side I was sitting on and looked where the fire was, and where the trouble was, by looking on the left side; the trouble was on the opposite side from where I was.

Q. (By Mr. Whittemore.) How far away from you?

A. Well, of course, it is about over the width of that car, then it is an awful hard place to bend down. It was in front of me, kind of cornerways.

Q. (By Mr. Whittemore.) Isn't it true that you reached over and the flames sort of flared up, and you lost your balance, and fell off the car?

A. Well, if the brake wasn't set sudden, I don't believe I would ever have fell.

Q. You think it was the setting of the brake?

A. Yes, that threw me.

Q. That caused you to fall off?

A. Yes.

The car was running about twelve miles an hour at the time I went off, ran about two rods after I fell off. The trouble I found was that gasoline was escaping through a cock, I saw it plainly when I bent down to look; I should judge that from one-third to one-half of the gasoline that would go through that cock was escaping. I did not see the gasoline escaping looking from the right side, when I was looking from the left side under the car (31) I bent down awful quick and looked under, then straightened up and reached over and as I reached over the flame came up, I couldn't get to it, and the sudden setting of the brake and straightening up at the same time, I fell off; it threw me you understand. Stopping these cars depends a lot on the level of the track; they can be stopped in about four rods without any sudden shock, but in emergencies things are generally stopped quicker; throwing off the spark and setting the brake would cause some shock, but I only started setting the brake, then the Mexican took it, one of the Mexicans ran the car back to Bonnie Clare, and I did not know what the condition of the car was after I had fallen off. There was no more fire, one of the Mexicans told me they had closed it.

Q. (By Mr. Whittemore.) Now when you turned over to the left, and looked down under, and saw this gasoline leaking why didn't you stop the

car and get off, and turn it off instead of trying to bend over on the other side of the car?

A. The first thing that crossed my mind seeing fire I acted so quick that I just thought of an explosion the first thing; that is the natural condition any time around gasoline.

Q. Of course the natural and better way would have been to have waited until the car stopped and then turned off the gasoline, would it not?

A. I didn't know the tank wouldn't explode. A person would lots of time think of those things afterward.

Q. You signed a report of this injury and accident, did you not, shortly after it occurred?

A. Doctor Clarke came to me and said he wanted an accident report the first day I was in the hospital.

Q. You remember about a report being gotten up, and you signing it?

A. Yes.

Q. You know your signature, don't you?
(Hands paper to witness.)

A. Yes, that looks like my signature.

Q. The rest of it is not yours? A. No, none of it.

Q. Now these questions were read to you, and your answers were written down by Mr. Clarke, were they not, and then you signed it?

A. Yes; I don't know whether he had written them down correctly or not.

Q. Well, you read it over before you signed it?

A. No, I didn't read it over; he read it to me.

Q. He read it to you? A. Yes.

Q. And then you signed it? A. Yes; I told him I wanted to lay down in bed.

Mr. Whittemore: We offer this report in evidence, if the Court please, in connection with the cross-examination.

Mr. Miller: We object to it, if your Honor please, upon the ground that it has not been shown that the plaintiff knew the contents as they are written down; he didn't read it himself; it was read to him, or something was read to him, and he had not himself seen the writing, or read it.

Mr. Whittemore: The contents state that this document was read to him, and that the answers were read to him, and he signed it.

Mr. Miller: It is further objected to, if the Court please, that under the pleadings and the law of this State, there is no defense of assumption of risk, there is no defense of contributory negligence, and that the matters therein contained constitute no defense in the case.

Mr. Platt: Of course, if the Court please, in answer to the last objection made, we desire to state that the report itself tends to show an absence of

negligence on the part of the defendant company, which certainly is an adequate defense.

The Court: The only question I was thinking about was whether that was the exact document that was read over to him; he can look that over and see.

Mr. Whittemore: He has already testified, if the Court please, that it was, and that it was his signature.

The Court: He says the document was read over to him.

Mr. Whittemore: And then he signed it.

The Court: He didn't read it though. Just look at that Mr. O'Brien. (The paper is handed to the witness to read.)

Witness: I don't remember that it was exactly like that.

The Court: (Q). In what was it different?

A. I never remember that word "slipping" at the top, or mentioning it at all, or being read.

Q. Otherwise it is the same document that was read over to you?

A. I don't remember all the words; I was in such pain at that time that I didn't feel like being bothered.

Q. Have you anything else to say in reference to it?

A. Yes, Doctor Clarke came to me and said they had to have—

Q. No, I don't want that; just about the accuracy of the paper, as to what there is in that paper; have you anything else to say about what there is in the paper?

A. Well, I never remember the word "slipping" being in either place when it was read to me—it is in two places.

The Court: It will be admitted.

Mr. Miller: We desire to save an exception on the grounds stated in the objection.

(The paper is admitted in evidence, marked Defendant's Exhibit No. 1, read to the jury, and is as follows:

**"LAS VEGAS AND TONOPAH RAILROAD
COMPANY.**

STATEMENT OF INJURED PERSON

1. State when and where you were injured.

Answer: July 2nd, 1913, near Bonnie Clare.

2. State what, in your judgment, was the cause of your injury?

Answer: Slipping and falling off of motor car.

3. In your opinion, was there any defect in Track, Cars, Engine, Tools, Machinery or other appliances or place where you were working or any carelessness on the part of the Company or anyone

in the Company's employ tending to cause the accident? If so, what or whom?

Answer: Defective cock shook loose permitting escape of gasoline, which took fire.

4. Could you by more care on your part, have prevented your injury?

Answer: Yes.

5. How long have you been in the Company's employ?

Answer: Four years.

6. State all other particulars you may know relative to the accident.

Answer: I tried to close the cock while car was in motion, slipped and fell off. Another man was applying brake at same time.

7. If married, of whom does your family consist?

Answer: Not married.

The above is a true statement, to the best of my knowledge and belief.

(Signed)

WM. O'BRIEN.

Witness: H. H. Clark, Asst. Surgeon.

Date, July 3rd, 1913.

Q. (By Mr. Whittemore.) Now Mr. O'Brien, what did you mean in response to the fourth question: "Could you by more care on your part, have prevented your injury?" And you answered "Yes," what did you mean by that—in what way?

A. Well, after the accident happened; I didn't know it then—by the time I made that; I reached over to close that, I had fire in my mind; I thought afterwards, after there was no explosion, that probably if I had stopped the car it might not have happened, but I did not know it at the time I reached over; we can all see those things afterwards.

Q. Well then, it was a mistake in judgment on your part, wasn't it?

A. To a certain degree; I never expected that I would go off the car when I reached over at all.

Q. Then the whole matter of your slipping off that car was a mistake in judgment on your part, was it not?

A. I don't think so, not at the time.

Q. If you had waited until the car stopped, the accident would never have happened, would it?

A. It may not, I don't know.

Q. Do you remember making another report at this same time on another blank?

A. There was two of them there.

Q. Is that your statement there? (Hands paper to witness.) Just look that over carefully from beginning to end, and see if it is correct, and see if it is just as it was when you signed it. Do you see anything different about that than when you signed it?

A. No, it was read to me, that is all.

Q. Well, as you remember it, is it as it was read to you when you signed it?

A. Well, I don't remember the word "slipping" there.

Q. Aside from that is there anything else?

A. I never remember it being mentioned by whose directions I was sent to the hospital.

Q. Anything else otherwise than as you signed it, as you recollect signing it?

A. I don't know, really; I was in such pain.

Mr. Whittemore: We offer this in evidence, if the Court please, in connection with the cross-examination.

Mr. Miller: Objected to, if the Court please, on the ground, first, it does not specially identify the subject-matter by the plaintiff; second, in this case, under the law, there is no defense of assumption of risk or contributory negligence, and it is inadmissible to show any such defense—it has not been identified in any sufficient manner whatever.

The Court: (Q) Is this your signature?

Witness: Yes.

Mr. Miller: Your Honor will further observe that there is no evidence that the document is in the condition that it was at the time it was signed; no evidence whatever of its possession during the time, and no change has been made in it.

The Court: It is very much like a conversation: A Witness is asked if at a certain time and certain place, in the presence of certain individuals, he made a certain statement, and he replies, no, I didn't make that statement; then he is asked if he made a statement similar to that, or anything like it; and then gives the statement that he did make. Now this document is presented to him, and he has admitted that he signed it, and he has had an opportunity to show what he did say, or to show whether any of this is not what he did say; and it seems to me, after he has examined the document, and says certain things I don't remember of having said, or that he didn't say, that the document goes to the jury just as his conversation would in the case I have indicated. Of course, if you wish to have those matters pointed out more distinctly before the document is read, Mr. Miller, I think you have the right to do so.

Mr. Miller: I apprehend the witness has read it and sufficiently noted its contents, so far as that is concerned.

The Court: If there are any differences he has omitted to state, they ought to be drawn out now, before it is read; but you can follow your own course.

Mr. Miller: I shall certainly go into the circumstances under which this matter was done, in re-direct; I will ask this one question, however: (Q) Mr. O'Brien, from your examination of that docu-

ment, is there any language or words contained in it, other than the word "slipping" and the name "C. E. M. Bell" as the person by whose direction you were sent to the hospital, that you don't remember being in the paper at the time you first saw it?

A. Well, it seems to me that it is kind of briefed, some of it, and when it was read over (witness examines paper); well, I don't remember exactly what was read to me at that time; I can't remember the exact words.

Q. Did you, yourself, read that document?

A. No.

Q. Who read it to you?

A. Doctor Clarke?

Q. Where? A. In the Las Vegas Hospital.

Mr. Miller: That is all for the present.

Mr. Whittemore: We will have it marked Defendant's Exhibit No. 2.

Mr. Miller: Your Honor will kindly save us an exception on the grounds stated in the objection?

The Court: You may have the exception.

(The paper is admitted in evidence, marked Defendant's Exhibit No. 2, read to the jury, and is as follows:

LAS VEGAS AND TONOPAH RAILROAD COMPANY.

REPORT OF PERSONAL INJURY TO EM- PLOYERS, PASSENGERS OR OTHER PER- SONS.

1. Name, residence (street and number) and.

P. O. Address of person injured. Wm. O'Brien, Las Vegas.

2. Age. 42. Occupation. Carpenter.

3. A. Married or single. Single.

If married, name and residence of wife of husband.

B. If single, names and addresses of father, mother or nearest relatives. Martin O'Brien, Reedville, Wis. Brother.

4. A. Employe, passenger, traveler on highway, or trespasser? Employe.

If employe how long in service of this company, and in what capacity? Four years.

B. If passenger, where from and destination?

Ticket or pass?

C. If unknown, give full description (height, weight, hair, eyes, marks and clothing) and state what articles found on person.

5. State fully the nature and extent of injuries. Bruised back and muscular structures strained.

6. A. What was done with and for the person? Placed in hospital, Las Vegas.

By whose direction? C. E. M. Beal.

B. If not sent to hospital, why not?

C. Name and address of surgical attendant? Drs. Clark and Martin.

D. If dead, state disposition of remains. (Attach a copy of verdict of Coroner's jury, if inquest held.)

A. Date, hour (day or night), and exact point where accident occurred?

B. If at night, was it very dark? Kind of weather? Clear.

C. Did accident occur on or near a crossing? No. (State name and distance and direction from same.) Was watchman on duty?

D. Was view of trainmen or injured person obstructed? If so, by what? State fully.

E. Distance person was seen before accident?

F. Could train possibly have been stopped between time collision was imminent and time of accident?

G. On main or side track? Main track. Curve or straight line, (state whether curve to right or left.) Main track. Straight line. Up or down grade.

8. * * *

9. * * *

10. What was injured person doing at time accident occurred? Riding motor car.

11. Give full particulars of cause of accident? Loose cock jarred loose permitting the escape of gasoline which took fire. Attempted to close cock while car was in motion, slipped and fell off. Antonio Forres was setting brake at the same time.

12. A. Was person injured while making coupling or uncoupling? No.

13. * * *

14. A. Was there any defect in track, bridges, rolling stock, machinery tools, or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. Loose cock permitting escaping gasoline to take fire.

B. If there was any defect, how long had same existed. I do not know.

Had same been reported? No.

C. Did injured person know of defects? No.

15. State what precautions were taken and by whom to prevent the accident? None.

16. In your opinion what further precautions could have been taken. I could have let the car burn.

21. What does injured person say as to the extent of his injuries? Back bruised and muscles injured to extent to make him helpless.

22. A. What does injured person say was cause of accident? His attempting to close this cock while car was in motion.

23. Was injured person insane, intoxicated, blind or deaf? No.

24. Was anyone at fault? If so, who? No.

25. Name, occupation, postoffice address and residence of every person who witnessed the accident, or can give any information regarding it.

(Attach hereto the written statements of such persons, signed by each.)

Name.	Occupation.	Res. and P. O.
Antonio Forres	Laborer	Las Vegas
Jesus Caseo	Laborer	Las Vegas
Jose Solirio	Laborer	Las Vegas

(Sign here) Wm. O'Brien.

(Occupation) Carpenter.

(Address) Las Vegas.

Dated July 3, 1913."

At the time I signed Defendant's Exhibit No. 1 I was in bed in the hospital, the day after I was hurt about four o'clock in the afternoon. It was presented to me by Doctor Clarke; he came to me with those papers and said he had to have those reports in order to get his pay; he read off those questions to me and I answered them; then he read them over to me and I signed them; I didn't read them myself; I had a great deal of pain that day; Defendant's Exhibit No. 2 was presented about the same time; Doctor Clarke made out the papers; he was the doctor in the hospital; the Hospital of the Las Vegas & Tonopah doctors; I didn't read it before I signed it; he read it to me; it was about seven o'clock in the morning when I was hurt; I was sitting nearly sideways, not square; the brake was in front of me; there was but one lever; the sparking device is near the brake within four or five inches maybe, the cylinders nearly directly under me; the gasoline tank is a little to one side of the car in front of the cylinder; I never set a brake upon that car before the second of July, or any similar motor section car

suddenly; I made no inspection of the car when or before I took it out; I didn't notice any grease on the parts of the car; the exhaust made considerable noise; I never remember that car back-firing; I really don't know whether I would know what it was if I heard it; I never heard of a car taking fire through back-firing; the exhaust goes outside of the cylinders; I don't think there is any muffler on it; each cylinder has one exhaust; one exhaust points to the right and one points to the left; the exhaust is nearly a foot from the wheels; this pet-cock was probably two or two and one-half feet from the exhaust, I never measured it; I didn't look to see whether there was any fire coming out of the exhaust; I know that sparks come out of the exhaust at night; you can't tell that in the day time and fire comes out of the exhaust; the gasoline was running from this what you call a pet-cock or drain-cock; when it is turned square across it is closed, and is set a little ways down under where we sit, probably four inches under, four or six; the tank is about six inches deep; the pet-cock is connected with the gasoline tank; the gasoline that leaked through the pet-cock came from the tank; the pet-cock was used to take out a little gasoline in a can sometimes or to drain the tank; when the pet-cock was closed no oil was escaping; for the proper and safe operation of the car it should be closed; the pet-cock was partly open which caused the leak of the gasoline; I didn't open it; it should not have been open.

Q. What caused it to be open, if you know?

A. Well, it wasn't a new cock, new and tight, or it would not have jarred loose like it did; the jar of the car, no doubt caused it to open on the track that it traveled.

Q. And if it had been a new cock, or in comparatively good condition, would the jarring of the car have caused it to open?

A. No.

I haven't had a great deal to do with gasoline motor engines; I never heard of a new pet-cock coming open through the jarring of the car; I rode on cars before, the same kind of cars; I would not positively state on oath a new one would not do it, because I do not know; then the pet-cock was under the gasoline tank; I ran that car about twenty-one or two days; I knew very little about the car before that; I never had any knowledge of the pet-cock being changed and could not say whether it was changed or not; I don't know how old that pet-cock was; I never heard of the pet-cock on that car coming open before; the stream of the gasoline ran slanting; the pet-cock was set down out from the bottom this way; it has to go by—if I remember right, there is a pipe that runs out; that battery box is between the tank and this end of this, if I remember right, and there is the pipe that runs out a ways from the tank, where the battery works; the pet-cock was about two and one-half feet from me, that is where I was sitting.

(A)

We will first take up the objection and exception, taken by Plaintiff in Error, to the admission of Defendant's Exhibit No. 1, entitled, Statement of Injured Person. The ground of objection was:

1. That it has not been shown the plaintiff knew the contents as they are written down.

2. He did not read it himself.

3. It was read to him or something was read to him and he himself had not seen the writing or read it.

4. That under the pleadings and the law of this State there is no defense of assumption of risk.

5. That under the pleadings and law of this State there is no defense of contributory negligence.

6. That the matters contained in the Exhibit constituted no defense in the case.

The plaintiff's testimony in regard to this document did not supply a sufficient foundation for its admission in evidence. He testified "that the signature looked like his signature; that all the rest of it was not in his writing; that he signed some paper which was read over to him; that he did not read it; I don't know whether he had written them (answers) down correctly or not; (shown the paper) I don't remember that it was exactly like that; I never remember the words 'slipping' or mentioning it at all or being read; I don't remember all the words; I was in such pain at that time that I didn't feel like being bothered."

Counsel for Defendant in Error contended that this Exhibit No. 1 was admissible as showing the absence of negligence on the part of the defendant company. It is clear from the testimony that the plaintiff did not identify the paper as the paper which he signed while in the hospital. He identified no part of it. He positively stated that some parts of it he did not remember at all and that the paper which he signed was presented to him when he was in great pain and in bed. It was not in his writing.

Documents of this kind should be carefully scrutinized and fully identified before being admitted. There was no evidence whatever presented by Defendant in Error as to identification; there was no testimony as to the possession of the paper from July, 1913, to the date of trial, and no testimony of its being in the same condition and containing the same words. Plaintiff in Error contends that the trial Court erred in admitting this document, and that the admission thereof was prejudicial to the plaintiff; that the contents tend to show contributory negligence, if anything, which is not a defense under the Nevada State Industrial Insurance Act; further that it did not show or tend to show the absence of negligence on the part of defendant, since the negligence charged in the complaint was concerning a defective or worn pet-cock.

(B)

Plaintiff in Error also objected and excepted to the admission of the paper entitled "Report of Per-

sonal Injury to Employes, Passengers or other Persons," marked Defendant's Exhibit No. "2." The grounds of objection were:

I. It does not specially identify the subject-matter by the plaintiff.

2. In this case under the law there is no defense of assumption of risk or contributory negligence, and it is not admissible to show any such defense.

3. It has not been identified in any sufficient manner whatever.

The witness did not remember the word "slipping" and testified he really did not know whether the report was correct or not; he did identify the signature; that he doesn't remember exactly what was read to him at that time; that he did not read the paper, that it was read to him by Doctor Clarke in the Las Vegas Hospital. It will be observed that there was no evidence in behalf of the Defendant in Error as to this document; there was no evidence as to the possession of the document between July 3, 1913, and the date of trial; there is no evidence that no change had been made in it or that it was in the same condition. Plaintiff in Error contends that the trial Court erred in admitting this document, and that the admission thereof was prejudicial to the plaintiff; that the contents tend to show contributory negligence, if anything, which is not a defense under the Nevada State Industrial Insurance Act; further that it did not show or tend to show the absence of negligence on the part of

defendant, since the negligence charged in the complaint was concerning a defective or worn pet-cock.

**TESTIMONY OF MR. M. N. HOLLAND,
WITNESS IN BEHALF OF PLAINTIFF**

Mr. Miller: (Q) Mr. Holland, you may state the condition of this particular gasoline motor section car at the time you received it.

Mr. Platt: We object, if the Court please, upon the ground there is nothing to show the witness knew the condition of the car at the time of the alleged accident, and the testimony tends to show that he did not see the car until ten days, about, after the accident.

Mr. Miller: If the Court please, we have already shown by the testimony that there was a defect in that car at the time of the accident; we now propose to show that that car was in the same defective condition at the time this witness received it.

The Court: Well, as Mr. Platt says, the testimony so far shows that he didn't see the car until ten days after the accident.

Mr. Miller: That is true; it is not a question of what he saw about the car at the time, but we propose to show that the same defects existed ten days afterwards.

The Court: By this witness?

Mr. Miller: Yes.

The Court: Well, can you show that the car was in the same condition ten days after the accident as it was at the time of the accident?

Mr. Miller: We can't show by this witness, or any other witness that I know of, that the car had not been handled or used during that ten days. What I propose to show is, that this same defect, shown by the testimony of Mr. O'Brien, existed ten days afterward.

The Court: It don't seem to me it is exactly right to hold the defendant liable for a defect, without showing that the defect existed at the very time of the injury.

Mr. Miller: Well, that is shown, if the Court please, by the testimony of Mr. O'Brien, and on cross-examination.

The Court: If it is shown I suppose it will be conceded. I do not think it has been shown. It seems to me the testimony only shows that the oil was oozing or running out of that stop-cock. A great many things can happen to a stop-cock in ten days, and it don't seem to me the Company should be held responsible for that unless it is shown it was in that condition at the time of the accident.

Mr. Miller: The cross-examination of plaintiff brought out there was no oil leaking from it at the time they left Bonnie Clare.

Mr. Platt: I don't desire to take issue with counsel, but the testimony shows the car was not in-

spected by plaintiff at the time he left, and didn't know its condition; that is what the testimony was.

Mr. Miller: Certainly that is it.

The Court: It might be easy to show ten or fifteen days after the accident the condition of that stop-cock was bad, and it may have been in a perfectly good condition at the time of the accident.

Mr. Miller: I have nothing more to say, your Honor, I will take a ruling.

The Court: I will have to rule against you.

Mr. Miller: Your Honor will kindly save us an exception upon the ground that the evidence is competent to show the condition of the car ten days after the accident to Mr. O'Brien, and showing that the stop-cock was defective at that time.

Q. Mr. Holland, how long did you use this particular car after it was turned over to you?

Mr. Platt: Well, if the Court please, I don't like to object to everything, but I don't know what connection will be made with this question and other subsequent questions. As to what he did with the car ten days after it was turned over to him, is certainly incompetent, irrelevant and immaterial, and has no bearing at all upon the issues involved in the case.

Mr. Miller: It is merely preliminary to another question, Mr. Platt.

The Court: I will allow one question; if the answer don't disclose it is material, it will be subject to a motion to strike. Read the question.

(The reporter reads the question.)

A. I used that car from the time it was turned over until the 15th of the following November.

Q. Did you have any trouble with that car immediately after it was turned over to you?

Mr. Platt: We object, if the Court please, upon the ground it is incompetent, irrelevant and immaterial, and if any trouble did occur with the car after it was turned over to him ten days after this alleged accident, it is too remote, and could not be binding at all upon the defendant in this particular case.

The Court: I will sustain the objection.

Mr. Miller: We desire an exception on the ground that the testimony is competent, relevant and material.

The Court: If you feel very confident of that, I will listen to any authorities you have, Mr. Miller, but I don't see how that would be proper testimony. It appears to me, even if the defendant conceded that ten days after the accident that stop-cock was in a defective condition, I don't see how that could help you, because many a piece of machinery that is in perfect condition today wears out in a very brief time, or something happens to it.

Mr. Miller: I don't wish to state the matter before the jury but I may make an offer of proof.

The Court: Very well.

Mr. Miller: Suppose it would be shown that the car caught fire again from identically the same cause, in the same manner, would not that be competent?

The Court: I don't think so at that time. It don't necessarily follow because machinery is out of fix today, that it was out of fix ten days ago. I cannot regard that as proper testimony.

Mr. Miller: Well, if the Court please, in order to save my rights in the matter, I would like to make an offer of proof. Plaintiff now offers to prove by the witness—

Mr. Platt: (Intg.) We submit, if the Court please, if there is any offer of proof to be made, that it ought to be made out of the hearing of the jury.

The Court: It is the same matter you have already suggested?

Mr. Miller: Yes. If Mr. Platt wants the jury excused, all right. I want the matter in the record properly.

Mr. Platt: If counsel says that is the extent of the offer, I have no objection to the jury remaining.

Mr. Miller: If the Court please, plaintiff offers to prove by the witness on the stand, Mr. Holland, that a few days after the car in question—

The Court: (Intg.) How many days?

Mr. Miller: About eight days, if I remember, after the car in question was turned over to the witness, that the car caught fire from the same cause.

and in the same manner as charged in the complaint on the occasion of the injury to the plaintiff.

The Court: Well, if you have any authorities on that point I would like to see them, Mr. Miller; but for the present I will sustain the objection.

Mr. Miller: Will your Honor kindly save us an exception on the ground the evidence is competent, material and relevant, and that the point of time is not too remote for the proof of the matter stated in the offer.

TESTIMONY OF M. N. HOLLAND IN REBUTTAL

Q. At the time that Mr. Claiborn gave you this particular car on which Mr. O'Brien was hurt, after Mr. O'Brien's accident, was or was not the pet-cock wired?

Mr. Platt: We object, if the Court please, upon the ground that the time employed in the question is too remote, the witness having testified in direct examination that he did not receive the car from Mr. Claiborn until eight days, I think, after July 2nd, 1913.

Mr. Miller: The question is asked, if the Court please, in connection with Mr. Claiborn's denial of that fact.

The Court: Didn't you ask the question yourself?

Mr. Miller: I asked it of Mr. Claiborn, yes.

Mr. Platt: In cross-examination.

The Court: I doubt whether you can lay the foundation to get that testimony in in that way. Of course they didn't object to it at that time, and you put it in; I don't think that renders this testimony admissible.

Mr. Miller: It seems to me, if the Court please, we are entitled to it as affecting the credibility of the witness.

The Court: I don't think you can get in immaterial matters in that way; if I were to allow it in on the question of the credibility of the witness, it probably would be in for all purposes. I do not think it is admissible.

Mr. Miller: May the question stand until recess.

The Court: Yes; I am always ready to correct any error or mistake I make as long as the matter is in my hands.

Mr. Miller: This question may possibly be the same.

The Court: It is a matter of some importance to you, so you may ask it in as many forms as you wish in order to have the record as you want it.

Mr. Miller: (Q) Mr. Holland, at the time Mr. Claiborn delivered the car on which Mr. O'Brien was hurt, to you, did you see any evidences of fire on it?

Mr. Platt: We object, if the Court please, on the same ground.

The Court: I will let that go with the other. Of course this testimony would be admissible if you were to prove that the car was in the same condition ten days after the accident as it was at the time of the accident; there must be proof that there was no change, that the car remained in precisely the same condition as it was at the time of the accident.

The Court erred in sustaining defendant's objection to the question propounded to the witness Holland.

(Q). "Mr. Holland, you may state the condition of this particular gasoline motor section car at the time you received it;" to which plaintiff excepted, upon the ground that it was competent to show the condition of the car when the witness Holland received it, eight or ten days after the accident.

Plaintiff was entitled to show the condition of the car within such a short time and that the same defect of the worn and defective pet-cock then existed. The time was not too remote in view of the testimony of Mr. O'Brien that the pet-cock jarred loose and that a new pet-cock or pet-cock in good condition could not have so done, and that the gasoline escaped from the tank by reason of that worn pet-cock jarring loose. We think it was entirely competent for plaintiff to show that eight or ten days later, that pet-cock was in the same condition of being worn and loose.

(D)

The Court erred in sustaining defendant's objection to the question propounded to the witness Holland.

(Q) "Did you have any trouble with that car immediately after it was turned over to you?"

Plaintiff proposed to show that that particular car caught fire again from identically the same cause a few days, about eight, after the car was turned over to the witness, and caught fire again in the same manner as charged in the complaint.

We think it was competent evidence as showing the same defect in the same pet-cock within a few days after the accident to plaintiff.

(E)

The Court erred in sustaining defendant's objection to the question propounded to the witness, M. N. Holland, in rebuttal.

(Q) "At the time that Mr. Claiborn gave you this particular car in which Mr. O'Brien was hurt after Mr. O'Brien's accident was or was not the pet-cock wired?"

It will be noted that the witness Claiborn, a witness for defendant, denied that the pet-cock was wired on cross-examination. Defendant did not object to that question put to the witness Claiborn and we think that plaintiff was entitled to have the question objected to answered as affecting the credibility of the witness Claiborn; the witness being a

disinterested person, and that the Court's ruling in this instance was prejudicial to the plaintiff.

(F)

The Court erred in sustaining defendant's objection to the question propounded to the witness Holland.

(Q) "Mr. Holland, at the time Mr. Claiborn delivered the car on which Mr. O'Brien was hurt to you, did you see any evidences of fire on it?"

This question was asked under the same views as the previous questions and in furtherance of that question, with the same ruling, objection and exception.

Inasmuch as the testimony theretofore showed that the car caught fire, we think we were entitled to show by the witness Holland, that it showed evidences of fire a few days after the accident to O'Brien.

(G)

The Court erred in refusing to give plaintiff's requested instruction No. 8, as set out in the Bill of Exceptions, on file. This instruction was stated in the exact language of the Nevada Statute. The Court substituted for it the language contained in the opening part of its instruction to the jury, as set out in the Bill of Exceptions on file, and erred in using this language referring to the latter part, being sub-paragraph 4 of the Nevada Statute:

"This presumption does not control you, except in the absence of testimony. If there were no testimony on that point, you would presume that the negligence of the company was the direct and proximate cause of the injury. But when testimony has been produced, you are to consider all the testimony; and after a comparison and consideration of all, you are to arrive at your verdict, remembering that the mere fact that a man is injured, however much his injuries may appeal to our sympathies, is not a sufficient reason why you or I, or any one else, should be compelled to pay for it. We can only be held responsible for an injury to another person, where we have by our negligence caused the injury."

Our understanding of sub-paragraph 4, is that irrespective of testimony it holds four things: 1. That the injury of the employee was caused by the negligence of the employer. 2. And was the first result of such negligence. 3. That such negligence so presumed was the proximate cause of the injury. 4. That it rested upon the employer to disprove negligence and that the presumption was a controlling presumption, unless rebutted by defendant proving affirmatively that it was not guilty of negligence; moreover that the presumption of negligence under the Statute must be considered by the jury in plaintiff's favor in considering any evidence introduced by defendant in attempting to show that it was not guilty of negligence, and that in any case the statute required that the jury should hold in

accordance therewith as to direct and proximate cause.

It seems to us that the instruction of the Court took away from plaintiff altogether the benefit of the presumption contained in the statute, and the least that can be said of the instruction is that it was misleading on these points and it is shown to have influenced the jury by the fact that the jury afterward came into Court for further instruction upon the application of this statute at 10:50 o'clock p. m., when one of the jurors said: "That was the very question that I wished to mention again. I understood it and you explained that very clearly and emphatically that all the evidence must be taken into consideration in connection with the responsibility placed upon the defendant in this case by its not complying with the provisions of the Workmen's Compensation Act;" and the Court replied: "You are, of course, to consider all the testimony and to arrive at your conclusions from a consideration of **all the testimony.**"

It is very clear that some of the jury were misled by the Court's instruction and that the sum and substance of the Court's instruction on this point, was that the jury were to decide the case upon the testimony only, thus taking away from plaintiff the benefit of the statute as to presumption of negligence; that the defendant must rebut the presumption of negligence affirmatively and prove the absence of negligence on its part, was not conveyed to the jury by the Court's instruction.

It is the contention of Plaintiff in Error that under the Nevada State Insurance Law or Workmen's Compensation Act, there is a presumption of negligence and that it was wholly unnecessary for plaintiff to introduce any evidence whatsoever showing or tending to show negligence; that the burden rested upon the Defendant in Error to show, by competent evidence, that it was not guilty of negligence, and that the instructions given by the trial Court to the jury mislead the jury and, in effect, amounted to an instruction that the burden of proof rested upon the plaintiff to prove negligence, regardless of the presumption of negligence granted by the statute in question. We quote as follows from the instructions:

"There are three questions here which you are called upon to answer. The first is as to whether defendant was negligent in the matter of the stop-cock. The next as to whether the defect in the stop-cock, if it existed, was the cause of the injury; and, third, if you find that the negligence existed, and that the negligence was the cause of the injury, you are to ascertain what injury directly resulted from the fall from the car. Here the burden rests upon the plaintiff to establish his case." It will be observed that in this part of the instructions the Court ignored the matter of the presumption of negligence granted by the Statute and directed the jury that they must find that negligence existed; and in other parts of the instruction told them that they should consider all of the testimony in determining that

question, and at the place where this latter instruction was given, no reference was made to the presumption of negligence. Moreover, the instruction above quoted tells the jury that they must find that the negligence was the cause of the injury; whereas, the statute in question, in sub-paragraph 4 thereof, distinctly says that it shall be presumed that the injury was the direct and proximate cause of the negligence. The instruction above quoted throws the burden of proof upon the plaintiff in each of these particulars, which is contrary to the statute. This was manifest error and could not be otherwise than prejudicial to the plaintiff.

We quote again from the instructions as set forth in the Bill of Exceptions on file:

“The burden of proof in this case is upon the defendant to establish by a preponderance of the evidence that it was not negligent in causing the accident or the injury. In this connection, however, remember that it devolves upon the plaintiff to establish, by competent testimony, and by a preponderance of the evidence, the kind and character of negligence as charged in the complaint in this action; in other words, the proof in this regard must coincide with the allegations of the complaint, which in this case charges the defendant with negligence in supplying on the motor-car a defective or worn out stop-cock.”

The above quotation from the instructions, while in the opening sentence placing the burden of proof

on the defendant to show that it was not negligent, in effect does not so do. But on the contrary, charges the jury that the burden is upon the plaintiff to establish **by competent testimony and by preponderance of the evidence**, the negligence charged in the complaint. This again ignores the presumption of negligence granted by the Statute and limits the jury in considering the question of negligence to the testimony only, without regard to the presumption granted in the Statute. In our opinion the instruction should have been that the defendant is presumed to be negligent without any testimony on the part of the plaintiff in that regard, and that unless the defendant prove, by competent testimony and by a preponderance thereof that it was innocent of negligence, then the verdict should be for plaintiff; and that the proof on the part of defendant must be affirmative in character.

We quote again from the instruction as set forth in the Bill of Exceptions on file:

“You are simply to find out in the first place, without passion or prejudice, just as you would if you were determining a matter between two neighbors, whether the defendant was guilty of negligence.”

We apprehend that that was not the situation and, while the purpose of the Court was proper in endeavoring to impress the jury that they were not to be governed by the fact that the defendant was a corporation, rich or poor, and the plaintiff was a

working man; the effect was to reiterate to the jury the misleading idea that they were to determine the question of negligence without reference to the presumption of negligence.

We quote again from the instructions as set forth in the Bill of Exceptions on file:

“ * * * They are to consider all the testimony that has been introduced in this case in determining whether there was negligence or not. You cannot go beyond the evidence; you cannot take the opinion of counsel, and you cannot take the opinion of the Court; you are to base your judgment purely upon the testimony in the case.” Here again the Court repeatedly impresses upon the minds of the jury that they are limited to the testimony purely; that they cannot go beyond the evidence in determining the question of negligence.

We quote again from the instructions as shown by the Bill of Exceptions:

“Prior to the enactment of the Workmen’s Compensation Act the burden was on the plaintiff to establish his case by a preponderance of the evidence; in other words, it was necessary that the evidence should show that the defendant was guilty of negligence which directly caused the injury. Now this has been reversed. If it appears that O’Brien was injured in the course of his employment, it is presumed that the injury was the first result of and grew out of the negligence of the railway company, and that such negligence was the direct cause of the

injury. This is not a conclusive presumption; it merely constitutes a prima facie case and it is sufficient to throw the burden of proof on the defendant to rebut the presumption of negligence. Having heard and considered all the evidence, if you find therefrom that the defendant was not guilty of negligence, it is your duty to bring in a verdict in defendant's favor, but you must find that it was not guilty of negligence, otherwise your verdict would be for the plaintiff."

The opening sentences of this instruction gives no more weight to the presumption of negligence granted by the Statute than merely to shift the burden of proof. Our view of the Statute in question, Workmen's Compensation Act, is wholly different. We contend that the presumption of negligence therein granted is conclusive upon plaintiff's case, in other words, that the jury must find for the plaintiff on that question, unless defendant affirmatively proved that it was innocent of negligence. Again this instruction limits the jury to the consideration of the testimony only, without reference to the presumption of negligence on this question. Again the Court uses this language, "If it appears that O'Brien was injured in the course of his employment," whereas, as a matter of fact, the pleading admitted it. And where the Court says that the Statute merely constitutes a prima facie case, it must have been misleading to the jury, since under the statute it constituted a complete case on this question and

could only be met by affirmative proof on the part of defendant that it was innocent of negligence.

The contention of Plaintiff in Error is that the law conclusively presumed the plaintiff's negligence without a word of testimony being introduced on the part of the plaintiff, and that the only way that defendant could then escape that conclusion was by introducing evidence to prove that it was not negligent, and that in such case its proof must be clear and strong in order to overcome the presumption of negligence declared by law. We hold that it was the purpose of the compensation act to take away not only the defenses stated in sub-paragraphs one, two and three of Section 1 thereof, but also to relieve the plaintiff from the necessity of proving negligence, and, on the other hand, placing upon the defendant the duty of disproving the negligence. Further that there was no evidence whatever introduced on the part of the defendant to disprove negligence and that consequently under said Workmen's Compensation Act, plaintiff was entitled to a verdict; that the evidence submitted by plaintiff showing the happening of the fire and the injuries sustained by him showed absolutely nothing even tending to exonerate the defendant from the presumption of negligence and that, therefore, the verdict rendered by the jury was contrary to the evidence, and that such verdict could only have been arrived at through a misunderstanding by the jury as to the application of the Workmen's Compensation Act; and that the instructions given by the Court did so

mislead the jury; and that the latter is apparent from the questions propounded by members of the jury to the Court. We contend further that the verdict rendered by the jury was contrary to law, in that under said Workmen's Compensation Act the plaintiff was entitled to a verdict by reason of the provisions of said sub-paragraph 4 of Section 1 thereof, which gave to the plaintiff the benefit of the presumption of negligence on the part of the defendant, which could only be overcome by the defendant proving its innocence of negligence, and the defendant failed so to do. That in consequence of the misleading instructions given by the Court, the jury denied plaintiff the benefit of sub-paragraph 4, Section 1, of the Workmen's Compensation Act.

It will be observed that the Court stated in the opening instruction that this case was interesting because it was the first case under the Workmen's Compensation Act where the employer had rejected the Act, and we feel that the reason why the trial Court gave instructions which mislead the jury is due partly to the fact that this was the first case, and that these features of the Act had not previously been under consideration in the Courts; and moreover there were no decisions at hand to serve as a guide. Since the trial of this cause, the case of *George Hunter vs. Colfax Con. Coal Company* has been reported. This case was decided by the Supreme Court of Iowa, November 24, 1915, and is found at page 1037 of the Advance Sheets of the

N. W. Reporter, published December 24, 1915, 154
N. W. Reporter, page 1037.

In this case the Constitutionality of the Iowa Workmen's Compensation Act was directly assailed upon the exact point in issue here, and the Court affirmed the validity of the Act. Sub-paragraph 4, Section 1 of the Nevada Act is the same as the Iowa Act and the Iowa Court said: "That the employee need not prove the employer was at fault, but that the latter must show that he was not," and held that the employer must show his innocence of negligence affirmatively.

The opinion of the Court in the Hunter case is quite lengthy and goes into many questions in which the constitutionality of the Act was attacked. The Court held that the only complete defenses allowed the employer under the Act were two, to-wit: Intoxication on the part of the employee; and, willfully causing his own injury. But the Court also held that the employer might show, if he could, that the injury occurred through no fault of his, and on the latter basis taken together with the denial by the trial Court of trial by jury, the case was reversed. The Court used this language at page 1065 of 154 N. W. Reporter: "And upon him (defendant) is the burden of proof to rebut this presumption, and to show affirmatively that no negligence of his is at fault for the injury." We submit that in the case at Bar defendant introduced no evidence whatever,

(a) To rebut the presumption of negligence granted plaintiff by our Statute.

(b) No negative testimony showing or tending to show that it was in no wise to blame for plaintiff's injury.

(c) No testimony showing or tending to show affirmatively that defendant was in no wise to blame or at fault for plaintiff's injury.

We submit further that there was absolutely nothing in plaintiff's evidence tending to exculpate defendant; and if, under defendant's contention it should be conceded that there was evidence in plaintiff's case tending to exculpate defendant, that such evidence was not affirmative and utterly failed to establish that it was in no wise at fault or to blame for plaintiff's injury. In the absence of ruling cases and of any precedents whatever, this being the first case arising under the Nevada Act where this question was presented, we feel that the trial Judge was considerably handicapped in dealing with the question here presented; but that, as a matter of fact and of law, plaintiff lost his case because of the errors hereinbefore complained of and particularly by reason the erroneous instructions given to the jury in regard to sub-paragraph 4, Section 1 of the Nevada State Insurance Law or Workmen's Compensation Act.

The following facts clearly and fully appeared, to-wit:

1. That the gasoline motor section car was on fire.

2. That the gasoline was running from the pet-cock.

3. That the gasoline should not have been escaping from the pet-cock.

4. That the gasoline was running from the pet-cock because the latter was worn and defective, was loose and shook loose from the motion of the car.

5. That the car was furnished plaintiff by defendant.

6. That the duty of inspection rested upon defendant.

7. That no inspection by defendant was shown.

8. That plaintiff knew nothing about the worn and defective pet-cock before he was injured.

9. That plaintiff was hurt in consequence of the foregoing facts.

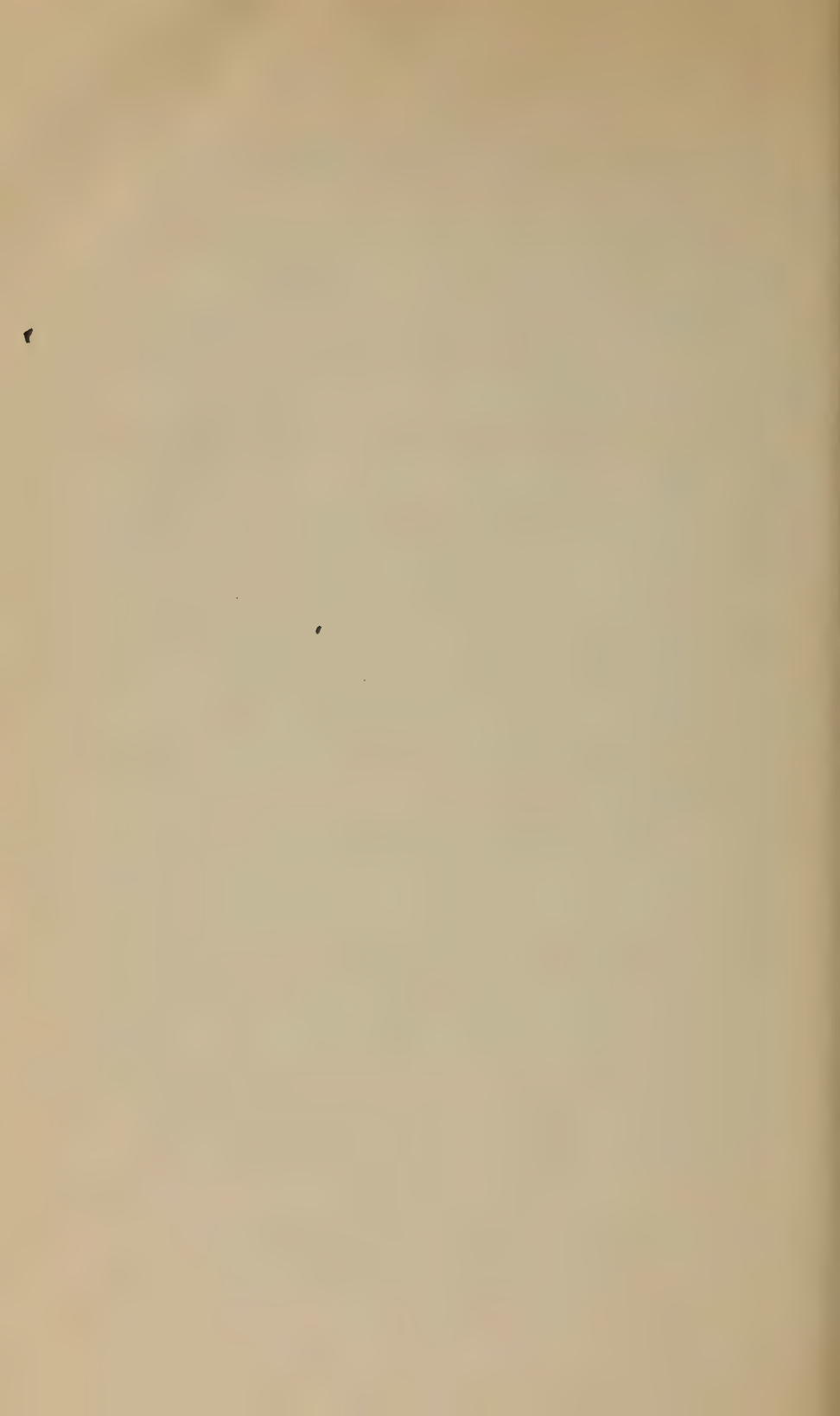
10. That plaintiff suffered serious injuries.

In view of these facts, the absolute lack of evidence on the part of plaintiff tending to exculpate defendant, and the errors heretofore complained of, it is respectfully submitted that the Order of the said United States District Court, for the District of Nevada, denying the motion for a new trial should be reversed; the judgment should be reversed, and a new trial ordered.

Respectfully submitted,

A. GRANT MILLER,

Attorney for Plaintiff in Error.



No. 2867.

IN THE
United States
Circuit Court of Appeals,
NINTH CIRCUIT.

William O'Brien,

Plaintiff in Error,

vs.

Las Vegas & Tonopah Railroad
Company, (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

C. O. WHITTEMORE,
Counsel for Defendant in Error.

No. 2867.

IN THE

United States

Circuit Court of Appeals,

NINTH CIRCUIT.

William O'Brien,

Plaintiff in Error,

vs.

**Las Vegas & Tonopah Railroad
Company, (a corporation),**

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

I.

The statement of the case in the brief for plaintiff in error is not controverted except that part in which it is stated "there was no evidence that the defendant was not guilty of any negligence." It is admitted that under the Nevada State Insurance Law, or Workmen's Compensation Act, the burden of proof is on the defendant in error to rebut the presumption of negligence. We contend that this requirement of the law

was fully complied with. The record, not having been printed, is not before us, but references will be made to the testimony of witnesses and other evidence in supplemental brief to be filed after we have had an opportunity to examine the record.

II.

Counsel for plaintiff in error devotes much space in his brief in an effort to show that the evidence was insufficient to support the verdict, which is not an assigned error.

III.

We will discuss the alleged errors in the order assigned.

First. The first error assigned is that the court erred in admitting in evidence on the cross-examination of the plaintiff the paper marked "Defendant's Exhibit No. 1." This paper is set forth in full in the brief of plaintiff in error, commencing on page 15. That part of the record containing the questions and answers and the ruling of the court leading up to the introduction of this exhibit commences on page 12 of brief of plaintiff in error. It will be noted that there is nothing in this statement, signed by plaintiff shortly after the injury, that is not testified to by him as a witness in this case upon direct examination, except possibly his answer to interrogatory 4 on page 16 of the brief of plaintiff in error, "Could you by more care on your part have prevented your injury?" "Answer: Yes." The plaintiff admits the correctness of the statement in regard to this question and answer as shown by

question on bottom of page 16 of brief for plaintiff in error, and answer of plaintiff on top of page 17 of said brief. There was nothing to the prejudice of the plaintiff in the admission of this statement, and no error of the court in admitting same.

Second. The second error assigned is that the court erred in admitting in evidence on the cross-examination of the plaintiff the paper marked "Defendant's Exhibit No. 2." This paper is set forth in full in brief for plaintiff in error, commencing on page 20, and that part of the record relating to the admission of the paper begins on page 17 of said brief.

There is nothing in this statement that was not testified to by plaintiff as a witness in this case, except possibly his answer to question 24, found on page 23 of brief for plaintiff in error, "Was anyone at fault? Of so, who? No." Plaintiff, when this paper was called to his attention, did not deny the correctness of this question and answer, nor the correctness of any of the contents of the paper, except possibly the use of the word "slipping," so that there was no error of the court in allowing this paper to be admitted in evidence as part of the cross-examination of plaintiff.

Third. The third error assigned is that the court erred in sustaining the objection of the defendant in error to the question propounded to the witness Holland, as follows:

"Q. Mr. Holland, you may state the condition of this particular gasoline motor section car at the time you received it."

The proceedings relating to sustaining objection of defendant in error to this question taken from the transcript, begins on page 30 of brief for plaintiff in error. It will be noted that an effort was made to show by the witness Holland the condition of this particular gasoline car about ten days after this accident, and without any showing as to what may have happened to the car meanwhile. The court very rightly sustained the objection to this question after counsel for plaintiff had admitted that they could not show that the car was in the same condition ten days after the accident as it was at the time of the accident. As very aptly said by the court on page 31 of brief for plaintiff in error: "A great many things can happen to a stopcock in ten days, and it don't seem to me that the company should be held responsible for that unless it was shown it was in that condition at the time of the accident," and also as remarked by the court, page 32 of brief for plaintiff in error: "It might be easy to show ten or fifteen days after the accident that the condition of that stopcock was bad, and it may have been in perfectly good condition at the time of the accident." There was no error of the court in sustaining the objection to this question.

Fourth. The fourth error assigned is that the court erred in sustaining the objection of the defendant in error to the question propounded to the witness M. N. Holland, as follows:

"Did you have any trouble with that car immediately after it was turned over to you?"

The proceedings in the examination of the witness Holland leading up to this question and to the sustaining of the objection made by counsel for defendant in error are set forth in the assignment of errors, and also on page 33 of brief for plaintiff in error. This record shows that the car was not turned over to the witness Holland until eight or ten days after the accident; consequently the condition of the car at that time would not be material or relevant, and there was no error in the court's sustaining the objection to this question.

Fifth. The fifth error assigned is that the court erred in sustaining the defendant's objection to the question propounded to the witness M. N. Holland in rebuttal:

“At the time that Mr. Claiborn gave you this particular car on which Mr. O'Brien was hurt after Mr. O'Brien's accident, was or was not the petcock wired?”

The proceedings regarding this question and the ruling of the court in sustaining the objection are found commencing on page 35 of brief for plaintiff in error. It will be noted that the objection to this question is based upon the fact that the witness Holland had testified in direct examination that he did not receive the car from Mr. Claiborn until eight days after the accident, and there was no effort to show and no showing that the car was in the same condition at the time the car was delivered to the witness Holland as it was at the time of the accident. There was no error in the court sustaining the objection to this question.

Sixth. The sixth error assigned is that the court erred in sustaining the defendant's objection to the question propounded to the witness M. N. Holland in rebuttal, as follows:

"Q. Mr. Holland, at the time Mr. Claiborn delivered the car on which Mr. O'Brien was hurt to you did you see any evidences of fire on it?"

The same objection was urged to this question as had been urged to the previous questions that there was no showing or attempt at a showing that the car was in the same condition when it was received by Mr. Holland eight days after the accident, as it was at the time the accident occurred, and there was no error in the court sustaining the objection to this question.

Seventh. The seventh error assigned is that the court erred in refusing to give plaintiff's requested instruction No. 8, as follows:

At the close of the evidence, plaintiff requested the court to give to the jury the following instruction, which was later refused, and exception taken.

"No. 8.

You are instructed that in this case, the defendant having rejected the terms of what is known as the Workmen's Compensation Act of the state of Nevada, there is no defense to plaintiff's action on the ground:

1. That the employee assumed the risks incidental or inherent to, or arising out of his employment, or
2. That the injury was caused by the negligence of a co-employee of plaintiff, or
3. That the plaintiff was negligent, and

4. In this case you are to presume that the injury to plaintiff was the first result and grew out of the negligence of the employer; and that such negligence was the proximate cause of plaintiff's injury provided you find from the evidence that the defendant was negligent."

We contend that this instruction was given in substance and almost in its entirety in the court's instruction to the jury, as follows:

At the conclusion of the argument, the court instructed the jury as follows:

"The Court: This has been a very interesting trial, not only in itself, but interesting because it is one of the first cases tried under what is known as the 'Workmen's Compensation Act' passed by our legislature in the year 1913, and amended during the present year.

Under the law as it existed before the passage of this statute, this railroad company could come before you, and allege, and attempt to prove, that the defect alleged was one of the ordinary risks of the business that plaintiff assumed when he entered into the service. The statute has taken that defense away. The corporation might also come here and state that the carelessness was the carelessness of a fellow servant. That defense the legislature has also taken away. It might also defend itself on the ground that the plaintiff himself was partly to blame for the occurrence. That, also, is taken away.

I want to read to you the statute. I shall read it slowly, because I wish you to observe it very carefully.

'In actions by an employee against an employer for

personal injuries sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the first result, and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence.'

This presumption does not control you, except in the absence of testimony. If there were no testimony on that point, you would presume that the negligence of the company was the direct and proximate cause of the injury. But when testimony has been produced, you are to consider all the testimony; and after a comparison and consideration of all, you are to arrive at your verdict, remembering that the mere fact that a man is injured, however much his injury may appeal to our sympathies, is not a sufficient reason why you or I, or any one else, should be compelled to pay for it. We can only be held responsible for an injury to another person, where we have by our negligence caused the injury.

Negligence under the law is the failure to perform a duty which is owed to another; that is, the failure to do that which an ordinary man, an ordinary prudent man, engaged in the same business, under the same circumstances, would do.

In this case the charge is laid in the complaint, and you are to remember that the plaintiff is bound by his complaint; he can only recover for the injury there alleged—he can only recover for the negligence there

alleged. The defendant may have been guilty of other negligence which resulted in his injury, but you cannot find a verdict on that score. For instance, if it should appear in this case that the injury was due to a broken wheel, or to a defective rail, or because the rails had not been properly spiked, you could not bring in a verdict for the plaintiff, no matter how negligent or careless the defendant may have been; you can only bring in a verdict for the negligence which is alleged in the complaint itself.

The allegation is that the defendant, riding on a handcar, was thrown off, and it was due to a specific failure on the part of the defendant to perform a duty.

The complaint says:

‘Said gasoline motor section car was defective in that the gasoline drain and tank valve, sometimes called the gasoline feed pipe, draincock or petcock, was so worn and out of repair that it caused and permitted the gasoline from the gasoline tank of said car to escape and fall upon the heated parts or portions of the machinery of the motor of said car, which said defect was known to defendant, its officers, agents and employees or could have been known to defendant, its officers, agents and employees by proper inspection, whereby the said gasoline became ignited and flamed up.’

The only defect alleged here is that the stopcock was so worn and out of repair that it caused and permitted the gasoline from the gasoline tank to escape. You cannot find defendant was negligent because someone had opened the stopcock, or because it had been carelessly left open. The escape of the gasoline must have

been due to the fact that the cock itself was worn, and out of repair.

Now the statute throws the burden of proving that it was not guilty of negligence in this respect upon the defendant itself. You, however, are not required to find the absence of negligence in the defendant's own testimony. You are to consider all the testimony together, and if it shows that defendant was not negligent, then you cannot in respect of the defective stop-cock bring in a verdict for the plaintiff."

If taken as a whole the charge was substantially correct and could not have misled the jury, the judgment will not be disturbed. (Hayne on New Trial and Appeal, Sec. 131, and cases cited.)

A case will not be reversed on some technical error in giving instructions when it is apparent from the entire record that the jury could not have been misled. (Pierce v. Seattle Electric Co., 145 Pac. 228-231.)

An instruction as follows was held to correctly state the law: "Preponderance and weight of testimony is where you believe the truth to be after hearing all the evidence." (Johnson v. Delano, 154 Northwestern 1013.)

There was no error in the refusal of the court to give instruction No. 8 in the form as requested by plaintiff in error.

Eighth. The eighth error assigned is that the court erred in giving the instruction upon the request of the jury at the time of their return into court, 10:50 o'clock p. m., for further instructions, which instruction and

the proceedings thereon are set forth in full in the assignments of error, and are as follows:

(At 10:50 o'clock p. m. the jury returned into court with a request for further instructions.)

"The Court: Gentlemen, can I be of service to you?

A Juror: May it please Your Honor, we would like to have that portion of the statute read touching on the Compensation Act. There is some dissension as to certain phases of the case, but I presume it would not be the proper thing to state to Your Honor just what that is.

The Court: Is it a question of fact or a question of law?

Juror: It is a question of fact. One of the jurymen, particularly, would like to hear the Workmen's Compensation Act read again, and then we will endeavor to thrash it out—do the best we can.

The Court: When you asked for the statute, and I told you you might have a copy of the portion that was read, I spoke before I thought. I had the copy made, but when I read it over, it seemed to me that without explanation, it was hardly the proper thing to send you. The statute reads as follows:

'In actions by an employee against an employer for personal injuries sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the first result, and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of

proof shall rest upon the employer to rebut the presumption of negligence.'

Prior to the enactment of the Workmen's Compensation Act the burden was on the plaintiff to establish his case by a preponderance of the evidence; in other words, it was necessary that the evidence should show that the defendant was guilty of negligence which directly caused the injury. Now this has been reversed. If it appears that O'Brien was injured in the course of his employment, it is presumed that the injury was the first result of, and grew out of the negligence of the railway company, and that such negligence was the direct cause of the injury. This is not a conclusive presumption; it merely constitutes a *prima facie* case, and it is sufficient to throw the burden of proof on the defendant to rebut the presumption of negligence.

Having heard and considered all the evidence, if you find therefrom that the defendant was not guilty of negligence, it is your duty to bring in a verdict in the defendant's favor, but you must find that it was not guilty of negligence, otherwise your verdict would be for the plaintiff.

Is that what you want, gentlemen?

Juror: That was it, Your Honor.

The Court: But you are expected to consider all the testimony on that point.

Juror: That was the very question that I wished to mention again. I understood it, and you explained that very clearly and emphatically, that all the evidence must be taken into consideration in connection with the responsibility placed upon the defendant in this case by

its not complying with the provisions of the Workmen's Compensation Act.

The Court: You are, of course, to consider all the testimony, and to arrive at your conclusions from a consideration of the testimony."

We submit that there was no error in these instructions. The instructions of the court were very full, and particularly as to the burden upon the defendant in error to prove that it was not guilty of negligence, and in our opinion nothing could have been stronger than the language of the court in the latter part of this instruction, as follows:

"But you must find that it (defendant in error) was not guilty of negligence, otherwise your verdict would be for the plaintiff."

There was no error in the last part of the court's instructions that the jury were to consider all the testimony and arrive at their conclusions from a consideration of the testimony. Counsel for plaintiff in error contends that only the evidence offered by defendant should have been considered by the jury in rebutting the presumption of defendant's negligence. The burden was on the plaintiff to show that the accident was caused in the manner alleged in the complaint, i. e., by the gasoline leaking from the stopcock taking fire, and if this had been established by plaintiff's testimony, the burden then would shift to the defendant in error to show that the leaking stopcock was not due to the negligence of defendant.

One of the contentions of defendant in error before the jury was that the plaintiff had utterly failed to

show that the gasoline was leaking from the stopcock, and that it had caught fire. It was contended by defendant in error that the story as told by the plaintiff upon the witness stand was improbable, and not worthy of belief by the jury. Expert witnesses were placed on the stand by defendant in error and gave testimony that it would have been impossible for gasoline leaking from the stopcock to have taken fire without an instantaneous explosion of the gasoline in the tank, and the blowing up of the car. The testimony of the plaintiff that he had time to look first on one side of the car, and then on the other side, and to shut off the brakes while a stream of gasoline was pouring from the stopcock, and was burning, was branded by expert witnesses of defendant as an improbable story, and an impossible condition.

The verdict of the jury shows that after consideration of all the evidence, they did not believe this improbable and impossible story of the plaintiff told on the witness stand. In determining the fact that there was no defective stopcock, and consequently no negligence of the defendant in error, the jury were entitled to consider all of the testimony offered by the defendant as to these points, as well as the testimony of the plaintiff, and as instructed by the court.

The contention of counsel for plaintiff that in determining this question of lack of negligence on the part of defendant that the jury was only to consider the testimony offered by defendant is not tenable and is not the law. If the evidence brought out on cross-examination of plaintiff shows or tends to show that defendant was not negligent, this

testimony is entitled to be considered by the jury in determining this fact, and to overcome the presumption of defendant's negligence raised by the statute. The record will disclose that there was evidence offered by defendant in error tending to show that the gasoline car was in good order when taken out by plaintiff and his co-workers, and that the morning following the accident the car was in good condition and running order, and that there were no marks or indications on the car of it having caught fire, and there was also evidence that the stopcock was in good condition, and was not leaking. This was immediately following the accident and before the car had been used except to run back from the point of the accident to the station at Bonnie Clare. It was shown by defendant by testimony at the trial that the car was taken out the next morning after the accident and used without anything being done to the car, and that there were no evidences of the car having been on fire, nor sign of any defect of the stopcock. All of this was affirmative evidence on the part of defendant, tending to overcome the presumption of defendant's negligence.

That all the rights of plaintiff in error under the Nevada Workmen's Compensation Law were fully protected by the court in its instructions to the jury is further shown by the court's instruction to the jury, as follows:

"The burden of proof in this case is on the defendant to establish by a preponderance of the evidence that it was not negligent in causing the accident or the injury. In this connection, however, remember that it devolves upon the plaintiff to establish by competent

testimony, and by a preponderance of the evidence, the kind and character of negligence as charged in the complaint in this action; in other words, the proof in this regard must coincide with the allegations of the complaint, which in this case charges the defendant with negligence in supplying on the motor car a defective or worn out stopcock. If you find from the evidence that the stopcock was not defective or worn out, or that the defendant was guilty of some other act of negligence not charged in the complaint, you will not then be justified in finding that the defendant was negligent in this action, and it would be your duty to bring in a verdict for the defendant company."

It will be presumed in this case that the evidence was sufficient to support the verdict of the jury, and that the jury were governed by this and the other instructions of the court in rendering their verdict, and that there was affirmative evidence showing that the stopcock was not defective or worn out, and that the defendant in error was not negligent in causing the accident resulting in the injury to the plaintiff in error.

Respectfully submitted,

C. O. WHITTEMORE,

Counsel for Defendant in Error.

No. 2867.

IN THE
United States
Circuit Court of Appeals,
NINTH CIRCUIT.

William O'Brien,

Plaintiff in Error,

vs.

Las Vegas & Tonopah Railroad
Company, (a corporation),

Defendant in Error.

Filed

MAR 21 1917

F. D. Monckton,

Clerk

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

C. O. WHITTEMORE,
Counsel for Defendant in Error.

No. 2867.

IN THE

United States

Circuit Court of Appeals,

NINTH CIRCUIT.

William O'Brien,

Plaintiff in Error,

vs.

**Las Vegas & Tonopah Railroad
Company, (a corporation),**

Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

This case is before the court on alleged errors relating to evidence offered by defendant in error, and admitted by the court over the objection of plaintiff in error, and to the failure of the court to give certain instructions requested by plaintiff in error; also alleged error in the court's instructions to the jury.

The court will not consider any questions relating to the sufficiency of the evidence to support the verdict,

although a considerable part of the brief for plaintiff in error is devoted to a discussion of this subject.

As to issues of fact submitted to a jury on the trial of a cause in the Circuit Court, the verdict of the jury is conclusive on appeal.

St. Louis Paper Box Company v. Hubinger etc.,
100 Federal 595, 40 C. C. A. 577.

A court of error cannot review evidence to determine the correctness of a verdict.

Great Northern Railway v. McLaughlin, 70 Federal 669, 17 C. C. A. 330.

This rule is well stated in Transit Development Company etc. v. Cheatham etc., 191 Federal 963-4, as follows:

“When disposed of by the verdict of a jury properly instructed its decisions * * * are not reviewable by the Appellate Court.”

Also, the rule is well stated in South Western Brewery and Ice Company v. Schmidt, 226 U. S. 162, 57 L. Ed. 170, as follows:

“Whether there is creditable evidence to sustain the verdict is a question for the jury and not for an Appellate Court.”

The principal objection raised by counsel for plaintiff in error to the instructions of the court to the jury, and failure of the court to give an instruction in the exact language as requested by counsel for plaintiff in error, is that the court instructed the jury to consider all of the evidence in determining the question of negligence of the defendant in error. Counsel contends that the

jury should not have been allowed by the court to consider any of the evidence offered by plaintiff in error in determining the question of the negligence of defendant in error even though such evidence tended to show that the defendant in error was not negligent. After devoting considerable space in his brief to this point, counsel at the conclusion of his brief insists that there was absolutely nothing in plaintiff's evidence tending to exculpate defendant, and avers that if under defendant's contention it should be conceded that there was evidence in plaintiff's case tending to exculpate defendant, that such evidence was not affirmative and utterly failed to establish that defendant in error was in nowise at fault or to blame for plaintiff's injury. If such is the fact, then no injury resulted to the rights of plaintiff in error by the court's instructions that the jury should consider all of the evidence in determining the question of want of negligence on the part of defendant in error.

The testimony of plaintiff included in the record shows that the plaintiff and four Mexicans were the only persons present when the accident occurred. Upon cross-examination of plaintiff in error as shown in the record certain facts were brought out by counsel for defendant in error, showing and tending to show that the accident was not the result of negligence of defendant in error, and it was partly on the testimony of the plaintiff in error, brought out on cross-examination, that the facts were disclosed which tended to overcome the presumption of negligence of the defendant in error. It is contended by counsel for plaintiff in error

that the jury should not have been allowed to consider any of this testimony.

Counsel for plaintiff in error in a supplemental brief calls the attention of this court to the case of Hawkins v. Bleakly, recently decided by the Supreme Court of the United States. The question decided in the case last referred to is upon the constitutionality of a statute of the state of Iowa similar to the Workmen's Compensation Act of the state of Nevada under consideration in the present case, and which the court holds to be constitutional. No question is presented in the present case as to the constitutionality of the Workmen's Compensation Act of Nevada. The Supreme Court of the United States in the case of Hawkins v. Bleakly refers to the provision in the Iowa statute similar to the Nevada Workmen's Compensation Act, which provides that in an action against an employee who has rejected the act, it should be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut the presumption of negligence. In support of the constitutionality of this act the court quotes the case of Mobile etc. R. R. v. Turnipseed, 219 U. S. 35-42. In this case the constitutionality of a statute of Mississippi was questioned, which provides that evidence of an injury arising from the actual operation of trains, shall be *prima facie* evidence of want of skill on the part of the servants of the railroad company. The court in discussing the constitutionality of the Mississippi statute uses this language:

“The only effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end and the question of negligence is one for the jury upon all of the evidence.”

We submit that the language of the Supreme Court of the United States in the case just quoted from is almost the exact language used by the court in its instruction to the jury in this case.

Further referring to the provisions of the Mississippi statute above referred to, and to similar provisions in statutes generally, the Supreme Court uses this language:

“So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

“If a legislative provision not unreasonable in itself, prescribing a rule of evidence in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.”

Counsel for plaintiff in error would have this court so construe the Workmen's Compensation Law of Nevada as to bring said law directly within the objectionable provisions as pointed out by the Supreme Court of the United States in the language just quoted. It will be presumed by this court, in the absence of anything in the record to the contrary, that the defendant

in error in this case did produce some affirmative evidence tending to overcome the presumption of defendant's negligence, and having done so, defendant in error was entitled to have the jury consider all of the evidence offered in the case in determining whether or not the injury complained of as the result of the accident was due to the negligence of defendant in error. We respectfully submit that none of the assigned errors are well taken and that, therefore, the judgment should be affirmed.

Respectfully submitted,

C. O. WHITTEMORE,

Counsel for Defendant in Error.

